

Missouri Attorney General's Opinions - 1954

| Opinion | Date | Topic | Summary |
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| 1-54 | Feb 8 | TAXATION. INCOME. | Members of the Commissioned Corps of the Public Health Service actively serving prior to July 3, 1952, entitled to \$3,000. income tax exemption per Section 143.105; but not after said date. |
| 1-54 | Aug 9 | COUNTY COURTS. ASSESSORS. | County court in county under township organization does not have authority under Section 53.190 to remove township clerk and ex officio township assessor. |
| 1-54 | Dec 28 | Major General A. D. Sheppard | WITHDRAWN |
| 2-54 | Mar 16 | VITAL STATISTICS. | Division to record births proven under provisions of Section 193.200, RSMo 1949, and upon payment of statutory fees to issue certified copies of such records. |
| 2-54 | Aug 12 | PURE FOOD AND DRUG ACT. CIRCUIT ATTORNEY. | Duty of enforcing embargo provisions of Missouri Food and Drug Law devolves upon circuit attorney for City of St. Louis. |
| 2-54 | Aug 20 | DIVISION OF HEALTH. HOTELS. | Orders for alterations to be made in buildings used as hotels, to be given to the owner, proprietor or agent in charge of said buildings, when such building does not meet the requirements of a building used for a hotel by Missouri law, can only be given by the Director of the Division of Health or by a deputy, who may be the deputy of food and drug administration, when such deputy is vested with such authority by the Director of the Division of Health. The closing order for a hotel to be given following noncompliance with the order of alterations in the building mentioned above, can only be given by the same person under the same conditions as noted above; that is to say, the Director of the Division of Health or by a deputy invested with such authority by the Director of the Division of Health. |
| 2-54 | Dec 1 | APPROPRIATIONS. FEDERAL AID. DIVISION OF HEALTH. | Federal aid provided under Public Law 725 as amended by Public Law 482 stands appropriated for current biennium to Division of Health. |
| 3-54 | Feb 3 | COMPTROLLER AND BUDGET DIRECTOR. | The contract for the purchase of a rug by the Missouri Supreme Court did not need to be approved by the state comptroller and budget director; that a contract for repairs to the Missouri Supreme Court Building should have been approved by the Director of Public Buildings. |
| 3-54 | June 3 | APPROPRIATIONS. STATE BOARD OF | Members of State Board of Nursing entitled to compensation of ten dollars per day on and after date of appointment October 27, 1953, 95 |

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| | | NURSING. | per cent of appropriations under House Bill 384, Section 7.390, passed by the 67th General Assembly as of August 29, 1953, shall be transferred to the State Board of Nursing Fund for the use of the State Board of Nursing and expenses of said Board shall be paid out of such appropriation and that appropriated under House Bill 11, passed by the Second Session, 67th General Assembly. |
| 3-54 | July 1 | COMPTROLLER AND BUDGET DIRECTOR. | The provisions of Article IV, Section 28, Constitution of Missouri, 1945, are applicable to the judiciary; and on each claim submitted for payment the Comptroller must certify it for payment and the Auditor must certify that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. |
| 5-54 | July 14 | MUNICIPAL WATER SUPPLY. USE OF FLUORIDE. | The addition of fluoride to a city's water supply to make the fluoride content one part fluoride to one million parts water as recommended by the Division of Health of Missouri and the United States Public Health Service would not contravene any existing law of the State of Missouri. |
| 6-54 | Mar 18 | Hon. G. C. Beckham | WITHDRAWN |
| 6-54 | Sept 3 | COUNTY COMMITTEES. VACANCIES. PRIMARY ELECTIONS. | Vacancy created in a county committee by a tie vote is filled by a majority of the new county committee electing a qualified person to fill such vacancy. |
| 6-54 | Dec 27 | Hon. William T. Bellamy, Jr. | WITHDRAWN |
| 7-54 | Jan 22 | MOTOR VEHICLES. LICENSES. MISDEMEANORS. CRIMINAL LAW. PENALTIES. | The operation of a commercial vehicle with load in excess of maximum weight of license is subject to penalties provided by Section 301.440, RSMo 1949. Operation of vehicle licensed as local commercial vehicle outside local commercial zone is subject to penalties provided by Section 301.440, supra. Operation of vehicle on which license has expired is also subject to punishment in accordance with the provisions of the above mentioned section. |
| 7-54 | Feb 15 | CONDEMNATION. COUNTY. EMINENT DOMAIN. STATE HIGHWAY COMMISSION. | In the absence of agreement between the parties to a condemnation suit to the contrary, fixtures, attached to the land condemned, pass to the condemner. And, if the condemner wishes such fixtures removed, it must bear the expense of removal of said fixtures. |
| 7-54 | Apr 20 | MOTOR VEHICLE. TRAILER. FARM VEHICLES. | "Farm Wagon" drawn on highways by farm tractors not required to be registered as motor vehicle or motor vehicle trailer. |
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| 10-54 | Mar 26 | CLERK OF PROBATE COURT. | No salary provided for clerk of probate court in county of third class having population in excess of 10,750 but less than 15,000 inhabitants with a valuation of \$11,000,000. |
| 10-54 | June 29 | Hon. Gordon R. Boyer | WITHDRAWN |
| 10-54 | Sept 3 | MOTOR VEHICLES. CRIMINAL LAW. | Provisions relating to mechanical signaling devices as described in Section 304.019, RSMo Cum. Supp. 1953, are applicable only to new vehicles registered in Missouri subsequent to January 1, 1954. |
| 10-54 | Oct 4 | OPTOMETRISTS. NATUROPATHS. LICENSES. PROFESSIONS. | A naturopath not licensed as a physician or surgeon in this state, is not authorized under Sec. 336.120(1) to practice optometry without a certificate of registration from the State Board of Optometry. |
| 10-54 | Dec 14 | Hon. A. J. Bolinger | WITHDRAWN |
| 11-54 | Jan 11 | TAX. SCHOOLS. | (1) There is no specific time limitation as to when the clerk of the county court may turn over the supplemental tax book to the county collector to collect taxes authorized by a special tax levy election (2) Taxes authorized by special tax levy election become delinquent on January 1st of the year following the levy (3) Such taxes constitute a lien on the assessable real property in the district, and (4) Payment of those school taxes due at the time of payment, does not preclude collection from those taxpayers of the additional taxes due by virtue of the tax levy election. |
| 11-54 | June 11 | SCHOOLS. COUNTY COURT. COUNTRY TREASURER. | School district cannot by method provided for change of boundary lines absorb another entire district; new district, to be composed of two entire districts, must have within its limits twenty persons of school age; attempted formation of new district invalid so that county court has no duty to assign number to proposed new district and county treasurer has no duty to honor warrants of new districts or to transfer funds of old districts to proposed new district. |
| 12-54 | Sept 8 | Hon. Pascal G. Bryant | WITHDRAWN |
| 12-54 | Oct 18 | Hon. David G. Bryan | WITHDRAWN |
| 12-54 | Nov 8 | MOTOR VEHICLES. CRIMES AND PUNISHMENT. FORGERY. FALSE AFFIDAVIT. | False application for certificate of ownership to a motor vehicle a forgery, when. False application also false affidavit under Section 557.090, 1949. Taking of false acknowledgment by notary violation of Section 561.220, Laws, 1952, page 420. |
| 13-54 | Feb 1 | MORTGAGE. DEED OF TRUST. RECORDER OF DEEDS. | A public official claiming a fee for performance of his duty must put his finger on the statute authorizing such fee; and that no statute authorizes the payment of a fee to a recorder of deeds for entering on |

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| | | SATISFACTION OF RECORD. | the margin of the record the satisfaction of a mortgage or a deed of trust on realty. |
| 13-54 | Feb 5 | LIQUOR CONTROL ACT. INTOXICATING BEER LICENSE. | A person who, on or since December 5, 1933, has been convicted of a violation of any law applicable to the manufacture or sale of intoxicating liquor, which includes 5% or intoxicating beer, cannot legally be granted by the supervisor of liquor control and license to sell intoxicating liquor or 5% or intoxicating beer; a person so convicted prior to December 5, 1933, is not debarred from securing such a license if he be found to possess the other necessary qualifications; a person convicted of the violation of a law not related to the manufacture or sale of intoxicating liquor or 5% or intoxicating beer , is not debarred from obtaining a liquor license if he possesses other necessary qualifications. |
| 13-54 | Mar 2 | Hon. Leland C. Bussell | WITHDRAWN |
| 13-54 | Mar 11 | BOARD OF PROBATION & PAROLE. CRIMINAL LAW. PARDONS. | Grounds for recommending pardons to the Governor by the Board of Probation and Parole |
| 13-54 | Mar 11 | BOARD OF PROBATION AND PAROLE. PAROLES. PARDON AND PAROLE. | Board of Probation and Parole may, in its discretion, grant parole without requiring personal interview. |
| 13-54 | Mar 25 | TAXATION. MUNICIPALITIES. | Personal property located without the city limits but belonging to a resident of the city is subject to taxation for municipal purposes. |
| 13-54 | June 8 | ELECTIONS. CIVIL RIGHTS. CONVICTS. INTERMEDIATE REFORMATORY. | Person released from Intermediate reformatory by Governor's commutation in 1940 may have right to vote restored only by pardon; may not serve as juror until pardoned, if convicted of crimes listed in Sections 557.490, 559.470, 561.340, or if over twenty convicted of crimes listed in Section 560.160; may not hold office of honor, trust, or profit if convicted of crimes listed in Sections 557.490, 558.130, 559.470, 561.340 and 564.710; or if over twenty years of age and convicted of one of the crimes listed in Section 560.610, unless he receives a pardon. |
| 13-54 | June 18 | FIREWORKS. COUNTY COURT. | County court cannot regulate or prohibit sale or use of fireworks, nor limit sale of fireworks to location with permit. |
| 13-54 | Sept 15 | MAGISTRATES. | Salaries of magistrate, clerk, deputy clerk and other employees in court |

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| | | COURTS. COUNTIES. | of “additional magistrate” established pursuant to Section 18, Article V, Constitution of Missouri 1945, to be paid by county wherein located; and fees derived from operation of such court to be retained by such county and used for such purpose. |
| 13-54 | Oct 5 | TRAFFIC ORDERS OF JACKSON COUNTY. | The County Court of Jackson County has exceeded its authority, and Section 6 of Article XII is without foundation in statute or constitution, and since the County Court exceeded its jurisdiction, such provision is null and void. |
| 13-54 | Oct 15 | Hon. Leland C. Bussell | WITHDRAWN |
| 13-54 | Oct 22 | TAXATION AND REVENUE. DELINQUENT TAXES. COUNTY COURTS. | County Court authorized to sell land purchased by county trustee at delinquent tax sale for consideration greater than amount of delinquent taxes. |
| 13-54 | Nov 5 | COUNTY COURT. | In counties of first class it requires one public hearing before any amendment to regulation or zoning order can become effective. |
| 14-54 | Jan 14 | COUNTY COLLECTORS’ FEES. TAXATION. RAILROAD TAXATION. | Taxes on bridge, express and public utility companies are to be included under the provision of Section 52.260 RSMo 1949, for the purpose of determining collectors’ commissions. Railroad taxes are not to be included. Collectors’ may not retain commission for collection of railroad taxes if the maximum compensation allowed them under Section 52.270 RSMo 1949 is exceeded by their addition. |
| 14-54 | Jan 20 | FEES AND SALARIES. MARRIAGE LICENSES. MORTGAGES. PUBLIC OFFICERS. RECORDER OF DEEDS. | 1. The \$750.00 increase in annual compensation for recorders of deeds of third class counties wherein the office of recorder of deeds and circuit clerk are separate, provided by Senate Bill No. 42, 67th General Assembly, shall be prorated for the year 1953. 2. Such recorders of third class counties are not entitled to the fee provided by Section 59.490, for recordation of discharges of veterans after the effective date of said bill. 3. The basic fee for issuance and recordation of marriage licenses is \$1.00. The recorder is entitled to 25¢ for each affidavit that is reasonably necessary in determining the age of the applicants if there be reasonable doubt that such applicants, or either of them, are under the legal age for marriage. Further, that if one or both of the applicants are of an age that requires the consent of a parent or guardian, the recorder is entitled to 50¢ for his certificate and seal that such consent has been given. 4. Punctuation marks, dollar signs and numerals are not to be considered “words” in computing recorders’ fees under Section 59.310, V.A.M.S. 5. The recorder of deeds is not authorized to satisfy of record a chattel mortgage merely upon the presentation by the mortgagor of the original note marked paid. Such satisfaction of record shall be in |

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| | | | accordance with Section 443.490. |
| 15-54 | May 12 | COUNTY OFFICERS. OUSTER. | The amount of time which a county officer must personally devote to the duties of his office in order not to be subject to ouster from his office is a matter which must be determined upon the basis of the particular facts and circumstances in each case. |
| 15-54 | May 24 | PUBLIC RECORDS. VETERANS. STATE SERVICE OFFICER. | State Service Officer entitled to such public records as he needs in connection with his official duties without charge. Copies of such records may be requested by Assistant State Service Officer. |
| 15-54 | July 28 | ASSESSMENT OF PERSONAL PROPERTY IN TOWNSHIP ORGANIZATION COUNTIES. | In township organization counties personal property should be assessed and taxed in the township where the owner resides, even though the property is physically located in another township; if the property is partnership property it should be assessed against the partnership at the place where located. |
| 15-54 | Sept 8 | SHERIFFS. PUBLIC OFFICERS. | Person resident of fourth class county for 75 days and of the State of Missouri for two years immediately prior to appointment is eligible for appointment as deputy sheriff in such county. |
| 15-54 | Dec 1 | STATE HOSPITALS FOR THE INSANE. PAYMENT FOR CONFINEMENT OF INDIGENT PATIENTS. | A county does not have a lien on real estate owned by the entirety by inmates of such hospital for the payment of expense of the confinement of such persons in State Hospitals for the Insane. |
| 16-54 | Apr 26 | HOUSE BILL NO. 369. TRAILER CAMPS. SALES TAX. | House Bill No. 369 is not a part of the Missouri Sales Tax Law, and therefore exemptions to the application of the Missouri Sales Tax Law do not apply to House Bill No. 369. Further, that trailer space rented by educational institutions to its students or affiliated personnel, is not subject to the application of House Bill No. 369, since such space is not offered for rental to the public. |
| 17-54 | Feb 18 | Hon. John R. Clark | WITHDRAWN |
| 18-54 | Apr 30 | BOARD OF ELECTION COMMISSIONERS. | (Counties of 200,000 to 450,000 inhabitants); Procedure for acquisition of (1) Office furniture, equipment and supplies, (2) Election supplies, equipment and services, and, (3) Voting machines. |
| 19-54 | Mar 31 | Hon. Noel Cox | WITHDRAWN |
| 19-54 | Sept 20 | Hon. Frank D. Connett, Jr. | WITHDRAWN |
| 20-54 | Mar 11 | SANITY HEARINGS. SHERIFF. | The prosecuting attorney of a county may represent the sheriff of the county at a sanity hearing in which the sheriff was the informant; state is an interested party in a sanity hearing because the public at large |

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| | | | may suffer in person or property from the dangerous vagaries of the individual alleged to be of unsound mind, and because such person by a dissipation of his property may become a charge upon the public purse. |
| 20-54 | Nov 18 | INSANE PERSONS. CONVICTS. PAROLE. | Superintendent of the state hospital in which an insane person is incarcerated pursuant to an order of the Governor suspending his sentence because of such insanity has no power to return him to the custody of the prison officials absent an order to that effect from the Governor. |
| 21-54 | Jan 11 | Hon. Bill Davenport | WITHDRAWN |
| 21-54 | Mar 19 | MISSOURI STATE HIGHWAY COMMISSION. STATE HIGHWAYS. | Missouri State Highway Commission has sole discretion in the location of state highways and may exact from political subdivisions contributions for the purchase of right-of-way therefor. |
| 21-54 | July 8 | COUNTIES. PARKS. | County court has no authority to make donation to city for park use in absence of joint cooperative agreement. |
| 21-54 | Dec 21 | SCHOOL DISTRICTS. TAXATION. PERSONAL PROPERTY. | Tangible personal property of an individual should be assessed to the benefit of the school district wherein the owner of the property resided, even though such property itself be located in another school district within the same county. |
| 22-54 | Mar 12 | SHERIFFS. FEES. THIRD CLASS COUNTIES. | The sheriff of a third class county is not required to make a verified report to the county court of his fees received in civil cases. |
| 22-54 | June 18 | Hon. Robert A. Dempster | WITHDRAWN |
| 22-54 | July 19 | ELECTIONS. VACANCY. COUNTY POLITICAL COMMITTEE. | When a vacancy by reason of death or withdrawal in the candidates for election for township committeeman or committeewoman occurs after the last day for filing for such position and before the day of election, the county political committee is not authorized to fill such vacancy. |
| 24-54 | Jan 11 | Hon. Michael J. Doherty | WITHDRAWN |
| 24-54 | Jan 12 | APPROPRIATIONS. | Purposes for which appropriation of one million dollars made in Section 5.150, Appropriation Laws 1953-55 may be disbursed. |
| 24-54 | Feb 1 | CIVIL DEFENSE. | A county may properly expend funds for the salary and mileage of a civil defense director; it would be improper to employ civil defense director and have him designated as a deputy sheriff although he performs none of the civil or criminal functions of the deputy sheriff. |
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| 24-54 | Mar 25 | Hon. John E. Downs | WITHDRAWN |
| 24-54 | Apr 26 | TAXATION. CORPORATIONS. | Corporations organized under Chapter 351, RSMo 1949, engaged in operating telephone exchanges subject to original assessment by Missouri State Tax Commission. |
| 24-54 | May 13 | Hon. Michael J. Doherty | WITHDRAWN |
| 24-54 | May 20 | COUNTY COURTS. SECOND CLASS COUNTIES. PURCHASES. | The county court of Buchanan county may purchase directly from Platte county, without asking for bids, an iron bridge to be used as a part of the road building program in Buchanan county. The county court of Buchanan county may, without asking for bids, purchase surplus government equipment for use in its road building. |
| 24-54 | June 8 | DOUBLE JEOPARDY. FORMER JEOPARDY. LIQUOR SUPERVISOR. CRIMINAL LAW. | A hearing by the supervisor of Liquor Control to suspend or revoke a liquor license does not place the licensee in jeopardy of being deprived of his life or liberty; within the meaning of Article I, Section 19, Constitution of Missouri, 1945, and Section 556.240 RSMo 1949, and, therefore, said hearing is not a bar to subsequent criminal prosecution for the same act in violation of the liquor control laws. |
| 24-54 | July 14 | SHERIFFS. | Sheriff in second class county should charge ten cents per mile for services in criminal and civil proceedings. |
| 24-54 | Aug 2 | Hon. John E. Downs | WITHDRAWN |
| 24-54 | Aug 10 | CITIES. CONTRACTS. PUBLIC POLICY. WELFARE BOARD. | A member of the common council of the City of St. Joseph may accept payment from the Social Welfare Board of Buchanan County for transportation of a patient to a hospital at the request of said board. |
| 24-54 | Aug 18 | BOARD OF ELECTION COMMISSIONERS. ELECTIONS. HOLIDAYS. VOTERS. REGISTRATION. | Office of the Board of Election Commissioners for the City of St. Louis may be opened for registration of voters on Sept. 6, 1954, even though that day is a legal holiday. Registrations for an election to be held in the City of St. Louis on Sept. 30, 1954, must be closed at 5 o'clock on Sept. 6, 1954. |
| 24-54 | Aug 20 | STATE PARK BOARD. EMINENT DOMAIN. | Missouri State Park Board authorized to condemn land in Adair County, Missouri. |
| 24-54 | Aug 30 | DEPARTMENT OF CORRECTIONS. PUBLIC BUILDINGS. | (1) The Department of Corrections, with the approval of the Board of Public Buildings, has the authority to determine that a particular building used by such department and which is no longer useful, shall be razed. (2) Director of Department of Corrections, with approval of the Governor, has authority to determine type of buildings to be erected for the use of the Department of Corrections. (3) Contracts for the razing and construction of buildings for Department of Corrections |

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| | | | are subject to the approval of the Director of Public Buildings. |
| 24-54 | Oct 22 | ELECTIONS. CHALLENGERS. WATCHERS. POLITICAL PARTIES. | Mr. Paul W. Preisler, candidate for Representative in Congress from the Second Congressional District on the Nonpartisan ticket is not entitled to have challengers and watchers present at the polling places within said Congressional District; St. Louis City Nonpartisan Committee is not entitled to have challengers and watchers present at said polling places in the absence of a showing that said group is a political party within the meaning of Secs. 120.140 and 120.160, RSMo Cum. Supp. 1953. |
| 24-54 | Oct 29 | ELECTIONS. | Prohibition against “political activity” by members of and employees of St. Louis City Board of Election Commissioners is not violated by attendance at political meetings nor by voluntary contributions to political parties, provided that participation in such activity is limited to that extent. |
| 24-54 | Nov 10 | Hon. Michael J. Doherty | WITHDRAWN |
| 24-54 | Dec 7 | SHERIFFS. CONSTITUTIONAL LAW. | County sheriffs receiving a certificate of election under Section 57.010, RSMo 1949, must be commissioned by the Governor under Article IV, Section 5, Missouri Constitution of 1945. |
| 26-54 | Mar 27 | CRIMINAL LAW. | (1) “Intent” not essential element in prosecution for violation of statutory crime mentioned (2) Magistrate in county having less than 70,000 inhabitants may assess penalty in excess of \$500.00 under Section 304.240, RSMo 1953, Cumulative Supplement. |
| 27-54 | Jan 15 | ADJUTANT GENERAL’S OFFICE. | Title to the above-described tract, located in the City of Marshall, Saline County, Missouri, as described in a corporation warranty deed dated December 4, 1953, is adequate, subject to no encumbrances, and vests in the State of Missouri, under local laws and ordinances, to the use for which the facility is intended, as of 1:00 p.m., December 10, 1953, subject to obtaining a certificate from the Clerk of the U. S. District Court wherein the said land is located, showing no pending suits, judgments, or other liens affecting the above described land. |
| 27-54 | Jan 15 | ADJUTANT GENERAL’S OFFICE. | The title to the real estate located in the city of Cape Girardeau, Missouri, as described in a warranty deed from the city of Cape Girardeau to the State of Missouri, dated November 24, 1952, is adequate, subject to no encumbrances and vests in the State of Missouri, under local laws and ordinances, to the use for which the facility is intended, as of 8:00 a.m. November 25, 1953, subject to a certificate from the Clerk of the United States District Court wherein said land is located, showing no pending suits, proceedings, judgments or other liens affecting the above described land. |
| 27-54 | May 24 | COUNTY ROADS. | A road which has been in continuous use for over forty years and upon |

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| | | PRESCRIPTION. | which public money and labor have been spent in such amount as to keep the road passable, is a legally established public road although it was not established by order of the county court. Such a road is confined to that portion actually used as a road bed. |
| 27-54 | Oct 22 | LOTTERY. | An operation whereby an automobile dealer gives a prize to the person who supplies the largest number of prospective purchasers who actually purchase an automobile does not contain the element of chance and is therefore not a lottery. |
| 31-54 | Feb 5 | RECORDERS. THIRD CLASS COUNTIES. | If the recorder of a third class county does not earn the sum of \$4,000.00 in fees in 1953, he is not entitled to the total sum, or to any portion of the sum, of \$750.00, provided in Section 59.250 S. B. 42 of the 67th General Assembly. |
| 31-54 | Mar 19 | INHERITANCE TAX. | Method of computing Missouri Inheritance Tax on trust estates. |
| 31-54 | Apr 26 | COUNTY DEPOSITARY. COUNTY FUNDS. | Accounts maintained by the county treasurer and ex-officio collector in a different capacity and right are insured up to \$10,000 by the FDIC; county court should select new depositary where depositary fails to qualify; selection not necessarily limited to banks within this state. |
| 31-54 | June 23 | OLD AGE ASSISTANCE. SOCIAL SECURITY COMMISSION. | The ownership of saleable real estate whose value is in excess of \$500, which real estate is not lived on by the owner, constitutes an available resource as that word is used in paragraph 5 of Section 208.010 RSMo Cumulative supplement 1953, and would render its owner ineligible for old age assistance. |
| 31-54 | July 21 | CRIMINAL LAW. | Nine questions regarding criminal procedure. |
| 31-54 | Oct 15 | Hon. W. C. Frank | WITHDRAWN |
| 32-54 | May 28 | CONSERVATION COMMISSION. WILDLIFE. | Conservation commission is authorized to require permit from dealers selling fish lawfully acquired in foreign state. |
| 32-54 | Sept 8 | Hon. Edward W. Garnholz | WITHDRAWN |
| 32-54 | Dec 31 | INSURANCE. BROKERS. | Sec. 379.350 RSMo 1949 prohibiting rebating is applicable to insurance brokers licensed under Sec. 375.270 RSMo 1949, and penalty provisions of Sec. 379.410 RSMo 1949 are applicable. |
| 33-54 | Mar 17 | BANKS. TRUST COMPANIES. SAFE DEPOSIT COMPANIES. WAIVERS. INHERITANCE TAXES. | Bank or other institution having deposits or other assets in joint names of deceased person and another must give ten day's notice of intention to transfer; transfer must have consent of Director of Revenue and Attorney General unless institution retains amount for taxes. Same rule applies to contents of safety deposit boxes; not applicable when estate not subject to inheritance taxes. |
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| 33-54 | Apr 7 | HOSPITALS. COUNTY HOSPITALS. SOCIAL SECURITY. | Employer's contribution for county hospital employees for social security paid out of hospital tax money, or 5% of general revenue appropriated for hospital purposes by county court. |
| 34-54 | Jan 21 | STATUTORY CONSTRUCTION. RULE 29.01, SUPREME COURT RULES OF CRIMINAL PROCEDURE. SECTION 485.120 LAWS OF 1951. | Fee of official court reporter of circuit court for transcripts made by him from notes taken of court proceedings had under provisions of Rule 29.01, Supreme Court Rules of Criminal Procedure, cannot be taxed as costs of the case. Only in those circuit court cases which are contested, and those in which the testimony is to be preserved shall the circuit clerk tax the \$5.00 fee prescribed by Section 185.120 RSMo. 1949, as costs of the case. When collected, the clerk shall pay said fee into the county or city treasury. |
| 34-54 | Mar 16 | SAVINGS AND LOAN ASSOCIATION. | Construction of Section 369.360 MoRS Cum. Supp. 1953, with respect to making loans in three specific instances. |
| 34-54 | Oct 29 | SAVINGS AND LOAN SUPERVISION. | Savings and loan associations cannot invest their funds in such first mortgage building bonds to be used in constructing a building in Jefferson City, Missouri. |
| 35-54 | Jan 11 | ELECTIONS. COUNTY COURTS. | County court of Greene County has exclusive jurisdiction to establish boundaries of election precincts for general, primary and special elections. |
| 35-54 | Jan 11 | STATE PARK BOARD. | The State Auditor is the only one authorized to prescribe the system of bookkeeping and accountancy for State Park Board. The State Park Board has no authority to contract with a firm of accountants to make an audit of the state parks. |
| 35-54 | Apr 19 | APPOINTMENT OF ATTORNEY. PRELIMINARY HEARING. | There is no obligation upon the part of a magistrate to appoint an attorney on behalf of an indigent defendant for a preliminary hearing on a felony charge. |
| 35-54 | May 14 | STATE PARKS. | No law exists to prohibit the sale of merchandise with the name of a state park inscribed thereon. |
| 35-54 | May 20 | ITINERANT VENDORS. AUCTIONEERS. | An itinerant vendor within the meaning of Section 150.380 et seq. who is selling his wares at public auction and is actually crying the sale must be licensed both as itinerant vendor and as a public auctioneer. |
| 35-54 | June 3 | STATE PARK BOARD. | State Park Board does not have power to transfer State Park to Missouri Conservation Commission. |
| 35-54 | July 16 | COUNTY TREASURER. COUNTY FUNDS. CANDIDATE'S FILING FEE. | (1) County treasurer should not commingle public and personal funds in same bank account (2) payment of candidate's filing fee by check drawn on county depository is valid. |
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| 35-54 | July 29 | ASSESSORS. | Real estate and tangible personal property assessed to one person to be reported to the Department of Revenue in separate entries. |
| 35-54 | Sept 22 | FEMALE EMPLOYEES. | Section 290.040, RSMo 1949, is applicable to female employees working in what is in fact either a “restaurant,” “laundry” or “snack shop.” |
| 35-54 | Oct 15 | Hon. Douglas W. Greene | WITHDRAWN |
| 35-54 | Nov 19 | CHILDREN. COURTS. CONTEMPT. NEGLECTED CHILDREN. SHERIFFS. | Circuit Courts in counties of 3rd and 4th classes, said counties having populations of less than 50,000, have the power to make orders touching upon the custody of neglected children, and the power to direct the sheriff to take physical custody of such children for the purpose of carrying out such orders of the court; and the sheriff or any other person willfully or knowingly disobeying such an order may be found to be in contempt of the court. |
| 37-54 | Feb 15 | DEPARTMENT OF CORRECTIONS. PENAL INSTITUTIONS. PERSONNEL OFFICERS. PUBLIC OFFICERS. | Department of Corrections of the State of Missouri may, within its discretion, establish a bureau of personnel pursuant to Section 216.050, RSMo 1949, and said department may, within the limits of its appropriation for such purposes, employ such personnel as it considers necessary to discharge the functions of that bureau. It is within the discretion of the Department of Corrections whether to appoint a person to supervise said personnel bureau. |
| 37-54 | Mar 12 | OFFICERS. | Offices of mayor of fourth class city and county clerk of third class county are not incompatible and both may be held by same person at same time. |
| 37-54 | June 4 | ELECTIONS. | One who filed declaration of candidacy for nomination of state representative within time and manner prescribed by Section 120.340 RSMo 1949, but at time failed to present receipt or other evidence that fee required by Section 120.350 RSMo 1949 was previously paid to treasurer of county central committee of party upon whose ticket candidate is running, but on same day, subsequent to filing of declaration, fee is paid and no receipt obtained therefor, candidate has substantially complied with Sections 120.340 and 120.350 RSMo 1949, and his name must be printed upon official ballot. |
| 37-54 | June 25 | Hon. Lane Harlan | WITHDRAWN |
| 37-54 | Dec 14 | CHIROPODY. REVOCATION OF LICENSE. | Advertising by a person licensed to practice chiropody, in violation of the code of professional ethics promulgated by the state board of chiropody, is not sufficient basis for the revocation of the license. |
| 37-54 | Dec 17 | COUNTIES. | St. Clair County will become a third class county as of the beginning of |

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| | | CLASSIFICATION OF COUNTIES. | the county fiscal year January 1, 1957. |
| 37-54 | Dec 31 | CONSTITUTIONAL LAW. CHIROPODISTS. LICENSES. PROFESSIONS. | A statute declaring that the violation by a chiroprapist of the Code of Ethics of the Missouri Association of Chiroprapists or the National Association of Chiroprapists would constitute a ground for revocation or suspension of the violator's license to practice chiroprapody in Missouri would be unconstitutional, and thus void. |
| 38-54 | Jan 11 | CIRCUIT COURT. COUNTY COURT. JURISDICTION. | The County Court of Dallas County may, by proper order, designate some other building within the seat of justice of Dallas County as the place to hold circuit court, and that prior to holding court at such new place the sheriff should make proclamation of the new place of holding court. |
| 38-54 | July 16 | Hon. Ellsworth Haymes | WITHDRAWN |
| 39-54 | Mar 31 | Hon. Rex A. Henson | WITHDRAWN |
| 39-54 | Apr 26 | COUNTY COURTS. | No authority to hold persons writing libelous articles in newspapers concerning the county court and its members, in contempt of court. |
| 39-54 | June 17 | PROSECUTING ATTORNEYS OF THIRD CLASS COUNTIES. REPRESENTING PERSONAL CLIENT. | A prosecuting attorney of a third class county may represent a defendant in condemnation proceedings by a city of the third class. |
| 39-54 | July 27 | Hon. George Henry | WITHDRAWN |
| 39-54 | Sept 13 | SCHOOL BOARDS. STATUTE OF LIMITATIONS. | School boards do not have discretion to waive the defense of the statute of limitations. |
| 39-54 | Sept 30 | SCHOOLS. BONDS. | Failure of board of directors of a consolidated school district to act upon a petition to dissolve the district does not invalidate their subsequent official actions, including the calling and holding of an election for a bond issue. When notices calling for a bond election state that the purpose of the election is to obtain a loan to erect a school building at a particular place, that it is necessary that upon an affirmative vote the building be located at the place indicated in the notice. |
| 40-54 | Jan 14 | COUNTY HEALTH CENTER. STATE TAX COMMISSION. TAXATION. | State Tax Commission will assess the distributable property of public utilities and apportion to each county its share thereof. This assessment is the assessment upon which a tax levy upon said property, for support of a county health center must be based. |

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| 40-54 | May 10 | TAXATION AND REVENUE. CEMETERIES. | Real property owned by nonprofit cemetery association subject to taxation until dedicated to purposes of organization. |
| 40-54 | July 15 | PLANNING AND ZONING. CLASS THREE COUNTIES. MEMBERSHIP. | A resident of Farley, Missouri, an incorporated town, is disqualified to act as a member or to perform service on the Platte County Zoning Commission. |
| 40-54 | Oct 5 | COUNTY COURT. ZONING COMMISSION. PUBLIC HEARINGS. | Chapter 64, RSMo 1953 Cumulative Supplement requires a public hearing to be held in each township to be affected by any amendment to any zoning order, regulation etc., thereunder. |
| 41-54 | July 8 | Hon. J. W. Hobbs, Secretary | WITHDRAWN |
| 41-54 | July 14 | COUNTY TREASURERS. SCHOOL DISTRICTS. BOARD OF EDUCATION. SCHOOL MONEY. | (1) A school board is under an obligation to certify a levy within the limits of its authority to discharge the district's obligations or bonds issued by the school district. (2) The board of education of a school district may not issue a warrant if there be insufficient money in the proper fund for the payment of said warrant unless it can be reasonably anticipated that there will be sufficient income during that school year to pay the warrant. (3) It is not permissible for the county treasurer to pay warrants drawn upon the sinking fund and interest fund from the moneys collected and placed in the incidental fund. |
| 41-54 | July 19 | OFFICERS. STATE AUDITOR'S DUTY IN APPROVING DEPOSITARIES FOR STATE FUNDS. | State Auditor's duty in giving approval of depositaries for state funds, selected by State Treasurer under Sec. 30.240, RSMo 1949, requires previous personal investigation or facts, exercise of judgment and discretion, and cannot be delegated to Auditor's chief clerk. After Auditor has investigated facts, exercised personal discretion and judgment, he may delegate duty of affixing his signature to written instrument evidencing his approval, to chief clerk. |
| 41-54 | Aug 11 | REAL ESTATE COMMISSION. EXAMINATIONS. | Missouri Real Estate Commission may designate suitable persons to distribute examination papers and supervise the taking of written examinations by applicants for real estate salesman license; said examination having been prepared, and to be graded, by the said Commission. |
| 42-54 | Apr 14 | CRIMINAL LAW. MAGISTRATE COURTS. | Form of recognizance of defendant for appearance at trial. |
| 42-54 | Aug 20 | ELECTIONS. CLAY COUNTY BOARD | A circuit court may not order a board of election commissioners to register or reinstate an elector, unless said appeal to the circuit court is |

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| | | OF ELECTION COMMISSIONERS. | taken within two days after the elector has been denied registration or his name has been stricken from the register by said board, but no time is fixed within which the circuit court is required to make its order to the board; no provision is made by law whereby a tie vote by the members of the election board may be decided. In the case of a canvass of voters by mail the return of the postal card sent out may be made in any manner which the elector sees fit to employ, including the return of the card to the board by a candidate in a pending election. |
| 42-54 | Dec 16 | CLASSIFICATION OF COUNTIES. COUNTIES. | Fourth class county which had an assessed valuation in excess of ten million dollars for each of the years 1949, 1950, 1951, 1952 and 1953 becomes a third class county at the beginning of the fiscal year January 1, 1955. |
| 42-54 | Dec 20 | Hon. John Hosmer | WITHDRAWN |
| 43-54 | Mar 26 | PUBLIC ROADS. COUNTY COURT. ADMINISTRATIVE LAW. APPEALS. | In proceeding before county court on petition to establish or vacate public road, county court required to cause stenographic record to be made of proceeding only on request and at expense of petitioner or remonstrater. Appeal from decisions of county court and scope of review governed by Sec. 22, Art. V, Const. Mo. 1945. |
| 43-54 | Apr 7 | TAX LEVY. COUNTY SUPERINTENDENT. SCHOOL DISTRICTS. | A county superintendent of schools cannot be compelled to submit more than one budget estimate to school districts within his jurisdiction, but can amend the budget; that no such authority is vested in the county board of education. |
| 43-54 | Oct 7 | VOTING. BALLOTS. | In voting upon two separate propositions regarding the restraint of animals over two different areas which are not identical, separate ballots should be used. |
| 43-54 | Nov 11 | STOCK LAW. ELECTIONS. | Proposition to invoke stock law by two or more townships, under Section 270.130 RSMo 1949, submitted at general election, requires vote of majority of voters in townships who vote at such general election to effect adoption. Mere majority of voters voting on the proposition is insufficient. |
| 45-54 | Jan 14 | FEDERAL OLD SOLDIERS' HOME. | Board of Trustees of Federal Old Soldiers' Home at St. James, Missouri, is not authorized under Section 212.130, RSMo. 1949, to require a pensioned resident-member of the Home to pay out his or her pension into the Federal Soldiers' Home during the time of their membership in the Home. |
| 45-54 | May 20 | Hon. O. R. Jacoby | WITHDRAWN |
| 45-54 | Sept 14 | COUNTY BOARD OF EQUALIZATION. PROSECUTING | When a writ of certiorari is issued against a county board of equalization, it is part of the official duty of the prosecuting attorney of the county to represent the board in all subsequent legal proceedings |

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| | | ATTORNEY. | relative to the issuance of the writ. |
| 45-54 | Nov 8 | SCHOOLS. LEVY OF TAX RATE. | The school board of a school district has no authority to call a special election to vote on fixing a rate of taxation in said district which is not provided for by statute. |
| 46-54 | Apr 19 | ELECTIONS. | Coleman R. Smith not a qualified voter of State of Missouri for two years prior to February 16, 1954, due to previous conviction of a felony and without having subsequently obtained "full pardon" as such term is used in Section 111.060, RSMo 1949. |
| 46-54 | Apr 29 | Hon. Olin B. Johnson | WITHDRAWN |
| 46-54 | Sept 22 | COUNTY COURT. INTOXICATING LIQUOR. LIQUOR DEPARTMENT. | County court authorized to charge a license fee to holder of a set-up license where intoxicating beverages are consumed on premises covered by said license. |
| 48-54 | Nov 22 | OLD AGE ASSISTANCE. DIVISION OF WELFARE. | Determination of State Division of Welfare that an applicant for old age assistance is legally ineligible, if based upon evidence applicant was owner of insurance policy having cash surrendervalue of \$600, being in excess of maximum allowed by Subsection 5, Sec. 208.010, Laws of 1953, p. 644, and Rule 14 of Division of Welfare is in accord with statute and rule and is proper. |
| 48-54 | Dec 14 | INTOXICATING LIQUOR. LICENSE. | A person may not manufacture intoxicating liquor for personal use in his home without obtaining the license and paying the fees required by Sections 311.180 or 311.190, RSMo 1949. |
| 49-54 | July 14 | CHILDREN. MISSOURI STATE HOSPITAL. | Illegitimate child born to inmate of Missouri State Hospital is resident of county from which mother was committed. |
| 50-54 | Sept 10 | ELECTIONS. ABSENTEE BALLOTS. WHERE NOTARIZED. | Affidavits to absentee ballots may be taken by Notaries Public in the county for which the Notary is appointed and adjoining counties by the terms of Sec. 486.010, V.A.M.S. 1949, and are not confined to the office of a Notary taking such affidavits. A Notary Public cannot take his or her own affidavit to an absentee ballot if he or she is the absent voter. |
| 51-54 | Jan 11 | COUNTY BUDGET. ROAD AND BRIDGE. POOR PERSONS. | <ol style="list-style-type: none"> 1. Surplus money received by a county treasurer from farmer donations under the County Aid Road Fund Act may not be placed in the road and bridge fund of the county but should be distributed to farmer contributors in proportions of the amount donated. 2. County court may in its discretion under conditions herein stated provide mild entertainment for poor persons at county poor farm. 3. County court may transfer fund from Class 1, 2 and 4 into Class 5 |

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| | | | prior to the end of the year under certain conditions. |
| 51-54 | Nov 23 | MOTOR VEHICLES. LICENSE FEES. | A person who is not a farmer may use a “local commercial motor vehicle” within the meaning of Section 301.010, et seq., to haul freight for hire so long as such activities are confined to a municipality and an area extending not more than twenty-five miles therefrom. |
| 52-54 | Jan 18 | INSURANCE. | Articles of Incorporation of The National Bellas Hess Life Insurance Company. |
| 52-54 | Jan 18 | INSURANCE. | Articles of Incorporation of New Empire Insurance Company. |
| 52-54 | Mar 15 | INSURANCE. | Section 376.360, RSMo 1949, relative to annual distribution of dividends on participating policies, applies to foreign life insurance companies licensed in Missouri. |
| 52-54 | Mar 24 | INSURANCE. | Articles of Incorporation of American Transportation Insurance Company. |
| 52-54 | June 8 | INSURANCE. | Certificate No. 63955 of The W. H. Irby Burial Association constitutes an insurance contract, and offering of the same in the state of Missouri without meeting the requirements of the Missouri Insurance Code is an offense under Section 375.310, RSMo 1949. |
| 52-54 | June 17 | INSURANCE. TAXATION. | Premium tax provided for in Section 148.340 RSMo 1949 is to be levied against foreign fraternal benefit societies which have reincorporated as legal reserve, level premium life insurance companies, only to the extent that the contracts remaining in force, or issued by such reincorporated companies, are devoid of assessment liability. |
| 52-54 | June 24 | INSURANCE. | Articles of Incorporation of Protective Casualty Insurance Company. |
| 52-54 | June 25 | BOOKKEEPING SERVICE. PUBLIC ACCOUNTANCY. ACCOUNTANCY. | The preparation of a financial statement does not constitute the practice of public accountancy within the meaning of Section 326.010, RSMo 1949, so long as the statement is not represented as having been prepared by a public accountant. |
| 52-54 | July 9 | INSURANCE. | Amendment of Articles of Incorporation of American Automobile Insurance Company. |
| 52-54 | July 9 | INSURANCE. | Amendment to Articles of Incorporation of Missouri National Life Insurance Company. |
| 52-54 | July 15 | INSURANCE. | Articles of Incorporation of The Protective Life Insurance Company. |
| 52-54 | July 16 | INSURANCE. | Articles of Incorporation of Hospital and Medical Insurance Company. |
| 52-54 | July 21 | INSURANCE. | TV Picture Tube Guaranty No. 5001, not a contract of indemnity insurance so long as sold by seller or one servicing tubes guaranteed, |

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| | | | but if TV Picture Tube Guaranty Co. does not service or sell tubes guaranteed, such company must be licensed as an insurance carrier. |
| 52-54 | Aug 9 | INSURANCE. | Current agreement forms, Nos. 9, 12 and 111 issued by United Development Co., Inc., a Missouri corporation, and Mount Lebanon Cemetery, effect a contract of insurance and may not be negotiated unless said corporation and association are licensed to conduct an insurance business in Missouri. |
| 52-54 | Sept 15 | INSURANCE. | Contract of Floral Hills Memorial Chapels, Inc. with Oliver F. Gregg, dated June 10, 1953, not an insurance contract. Persons negotiating such contracts not required to be licensed by superintendent of division of Insurance. |
| 53-54 | June 23 | PUBLIC ROADS. | A public road which has not been used by the public for a period of five years continuously becomes abandoned and ceases to have a legal existence. |
| 54-54 | Oct 8 | BANKS. LOAN LIMITS. | In a situation where two or more persons are partners in an enterprise, and carry a partnership account in a bank, but borrow no money in the partnership name, the individual borrowing of any of the partners is not to be taken into consideration in determining the loan limit from the bank of any other partner or partners. |
| 56-54 | Mar 11 | TAXATION AND REVENUE. | Tangible personal property of Missouri corporations to be assessed in county or counties where situated on the first day of January of each calendar year. |
| 56-54 | June 17 | ELECTIONS. PRIMARY ELECTIONS. VOTERS. | A person voting in a primary election morally obligates himself to support the nominee of the primary in which he participates. However, this obligation cannot be enforced by any court of law. |
| 56-54 | June 17 | CRIMINAL LAW. HIGHWAYS. | A person who knowingly obstructs a public highway by parking a trailer, housing a business enterprise, upon the right of way is subject to prosecution under Section 229.150, RSMo 1949. |
| 57-54 | Jan 28 | RECORDER OF DEEDS. DEPUTY. PUBLIC RECORDS. | Deputy recorder has no authority to record instruments after the death of the officeholder by whom he was appointed; such attempted recordation may not be given legal effect by a subsequent ratification of person appointed to fill the vacancy. |
| 57-54 | June 14 | TAXATION. COUNTIES. | County not liable for Federal Withholding Tax if withheld tax is not paid to county. |
| 57-54 | Dec 31 | JUVENILE COURTS. | Circuit clerk to perform clerical work arising in cases heard by juvenile court. |
| 58-54 | Feb 16 | CONSTABLES. ST. LOUIS COUNTY. | No authority exists for the election or the appointment of more than four constables in St. Louis County, regardless of the fact of the |

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| | | | creation of five magistrate districts in St. Louis County. |
| 58-54 | Apr 26 | CIVIL DEFENSE. | Funds of the City of St. Louis deposited with the State Treasurer as trustee to be applied on a particular project application on civil defense and remaining unexpended on June 30, 1954, should be disbursed as directed by the proper authorized official of the City of St. Louis. |
| 59-54 | Jan 28 | UNIVERSITY OF MISSOURI. APPROPRIATIONS. MEDICAL SCHOOL AT MISSOURI UNIVERSITY. BOARD OF CURATORS. | Funds appropriated under Section 7.031, Laws of 1953, may be used to enlarge and improve existing power and heating plant owned and operated by and serving the University of Missouri in order to serve heat and power needs of the new Missouri University four-year medical and surgical school. |
| 59-54 | Mar 1 | CRIMINAL PROCESS. CUSTODY. | A person arrested without warrant may not be held beyond the twenty hour period unless charges are preferred against him by a person competent to testify against the accused, and a warrant issued. When such twenty hour period expires on Sunday, a magistrate may entertain charges filed by a person competent to testify against the accused, and issue such warrant. |
| 59-54 | Apr 30 | WATER COURSE. IRRIGATION. | A riparian owner of land abutting on a natural or artificial water course may take water therefrom for purposes of irrigation, and in such quantity as will not unnaturally, sensibly or materially affect the flow of the stream. |
| 59-54 | June 8 | CRIMINAL PROCEDURE. PRESENCE OF DEFENDANT. | Magistrate or circuit court may receive plea of, try, or pronounce sentence upon defendant in misdemeanor cases in absence of such defendant with consent of such court, and the prosecuting attorney. |
| 60-54 | May 20 | CANCER HOSPITAL. COUNTY COURT. | The certification by a county court of a patient to the State Cancer Hospital continues until the patient is cured, is no longer in need of treatment by the hospital, or otherwise discharged, pursuant to Section 200.090 RSMo 1949. If, however, during the course of the disease, the patient moves his residence from one county to another, such removal extinguishes the obligation of the original certifying county, and certification by the new county of residence should be obtained. If a patient, having been discharged, removes his residence to a county other than the county originally certifying him for treatment, said patient may not again be admitted for treatment until properly certified by his new county of residence. |
| 62-54 | Jan 11 | PROSECUTING ATTORNEY. | Prosecuting Attorney may recommend compromise of claims against county; county court may effectuate a compromise of claims subject to |

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| | | COUNTY COURT. | valid dispute. |
| 62-54 | Mar 11 | CENTRAL COMMITTEE. POLITICAL PARTIES. | A vacancy occurring on the county central committee of any political party shall be filled by a majority of said committee. |
| 62-54 | May 6 | SCHOOLS. SCHOOL DISTRICTS. ELECTIONS. | Sufficiency of petitions for change of boundary lines. |
| 62-54 | May 10 | NEGLECTED CHILD. STATE SCHOOL. | An illegitimate child, born to a woman inmate of the state school at Marshall, which inmate was committed from Marion County, is a legal resident of Marion County. If such child is found to be a “neglected child”, Marion County is liable for its support, if such child has not been admitted to guardianship, and the Division of Welfare may assist the county with child welfare funds. The juvenile court of Marion County having acquired jurisdiction of such child may commit such child to the guardianship of the Division of Welfare of the Department of Public Health and Welfare for the purpose of procuring foster or boarding-home care for such child. |
| 62-54 | Aug 11 | SANITY PROCEEDINGS. PROSECUTING ATTORNEY. JUDGE AND CLERK OF PROBATE COURT. | It is not the duty of prosecuting attorney to prepare legal papers for sanity hearings for indigent insane person. Neither the probate judge or clerk should prepare legal papers in sanity hearings. |
| 62-54 | Nov 1 | HEDGE FENCES. | The term “hedge fence” as used in Sec. 229.110 means a fence composed of Osage Orange, and need not be one which is actually and presently used for fence purposes, but must be one intended or capable of being used for said purposes as distinguished from a voluntary, intermittent or irregular growth. |
| 63-54 | Feb 16 | TOWNSHIPS. | Township has no authority to use township machinery to do work for private individuals for hire. |
| 63-54 | Apr 1 | SPECIAL ROAD DISTRICTS. | A special road district may employ a private attorney and reimburse him out of its fund to represent the special road district in action brought to dissolve the district. |
| 63-54 | Apr 30 | COUNTY COURTS. BONDS. | A county court may agree at a stated consideration the cancellation of outstanding bonds prior to maturity date, where such agreement will result in substantial savings to the county in the nature of a waiver of future interest payments. |
| 63-54 | June 17 | ALTERATION OF TOWNSHIP LINES. | The county court of a county operating under township organization has the power to change a township boundary line upon the receipt of |

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| | | | a petition signed by not less than one-fourth of the voters of the township or townships affected, which petition is followed by a vote in the township or townships affected, and which proposition for change is ratified by a majority of not less than two-thirds of the votes cast. |
| 63-54 | July 19 | CANDIDATES. ELECTIONS. | In a case where persons seeking nomination for a public office do not have similar names, it would be improper for one of these candidates to have the prefix "Attorney" or "Atty." before his name on the ballot. |
| 63-54 | July 19 | SCHOOL DISTRICTS. ELECTIONS. RESIDENTS. VOTERS. | Destruction of county records by fire and subsequent drawing of supposed map by a former Judge of the County Court does not constitute a change of boundary lines of school district; a person who was a resident of an adjoining district before the fire and drafting of the map, is not made a resident of another district merely because the supposed map shows him to be a resident of such district. Since such person is not a resident of the district in question he is not a qualified voter at school elections held therein. |
| 63-54 | Sept 20 | SCHOOLS. TUITION. | School district not having a high school is liable for tuition, less fifty dollars, of student residing in said school district while attending high school in another district. |
| 63-54 | Oct 8 | MOTOR VEHICLES. MOTOR VEHICLE REGISTRATION RECIPROCITY. | Motor vehicle owned by Alabama corporation and used for commercial purposes or "for hire" hauling in Missouri must be registered in the State of Missouri. |
| 63-54 | Nov 19 | LOTTERY. GAMBLING. | A promotional scheme wherein the promoter in his effort to increase the sales of his product offers to give a cash prize to a portion of the purchasers of his product constitutes a lottery. |
| 63-54 | Dec 14 | DIVISION OF RESOURCES AND DEVELOPMENT. STATE MUSEUM. | Exhibits accepted for display in state museum to be retained or returned to owner in accordance with terms under which exhibit has been placed in state museum. |
| 64-54 | Jan 14 | Hon. M. E. Morris | WITHDRAWN |
| 64-54 | Feb 15 | CORONERS. DEATH CERTIFICATES. HEALTH OFFICER. VITAL STATISTICS. | In cases of death where there is no physician in attendance upon the death of the deceased person, and death is not such as to bring it within the jurisdiction of the coroner, the person in charge of interment may, during the incapacity of the local registrar to perform his duties, directly notify the local health officer, and said local health officer should complete the certificate of death, in accordance with Section 193.140, RSMo 1949. |
| 64-54 | Mar 31 | OPERATORS' LICENSE. | Director of Revenue may not revoke operators' licenses of persons found guilty of violating city ordinances. |
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| 64-54 | Apr 20 | TAXATION AND REVENUE. | Wentworth Military Academy as presently organized is not exempt from the Missouri Sales Tax upon purchases made to or sales made by such organization. |
| 64-54 | July 9 | LOTTERIES. "JOKER" IS NOT A LOTTERY. | Machine called "Joker" having all outward appearances and method of operation similar to a slot machine, except "Joker" has no means by which money can be inserted or obtained therefrom, and all a successful player can win are free games; said machine is not a gaming device adapted, devised or designed for the purpose of playing any game of chance for money or property within the meaning of Section 563.370, RSMo Cum. Supp. 1953. Keeping device, or inducing others to play same is not a violation of the section. |
| 64-54 | Aug 9 | TAXATION. INHERITANCE TAX. | No Missouri inheritance tax due on insurance proceeds held in manner described. |
| 64-54 | Sept 9 | MOTOR VEHICLE SAFETY RESPONSIBILITY. CRIMINAL PROCEDURE. EVIDENCE. | Certified copies of records of Motor Vehicle Safety Responsibility Unit have not been made "evidence" in criminal proceedings by virtue of statutory enactment. |
| 64-54 | Sept 22 | MOTOR VEHICLES. REVOCATION OR SUSPENSION OF DRIVER'S LICENSE. | The Director of Revenue does not have authority to revoke a motor vehicle driver's license under Section 302.271, V.A.M.S. 1949, where such person has been convicted of careless driving only; or to suspend such driver's license under Section 302.281, V.A.M.S. 1949, where such person has pleaded guilty or has been convicted of careless and reckless driving. |
| 65-54 | May 25 | SPECIAL ROAD DISTRICTS. | Last board of trustees of eight-mile special road district winds up affairs of district upon dissolution. |
| 65-54 | June 8 | INCOME TAX. INTANGIBLE PERSONAL PROPERTY TAX. ST. LOUIS HOUSING AUTHORITY. | (1) Interest derived from bonds of St. Louis Housing Authority is subject to Missouri Income Tax. (2) The bonds of the St. Louis Housing Authority are subject to the Missouri Intangible Personal Property Tax. |
| 65-54 | Dec 27 | POLICE. KANSAS CITY POLICE. RESIDENCE. QUALIFICATIONS FOR OFFICE. OFFICERS. | Police commissioners or policemen of the City of Kansas City must reside within the city and residence within an area which the voters have voted to annex but which annexation has not become effective will not satisfy this requirement. |
| 66-54 | Feb 1 | APPROPRIATIONS. | The General Assembly can create a special fund for the purpose of |

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| | | CONSTITUTION. GENERAL ASSEMBLY. ROADS. TAXATION. | financing local roads, but such special fund would be subject to dissolution, and appropriation for other purposes, by succeeding General Assemblies. |
| 66-54 | Feb 1 | Hon. Ralph B. Nevins | WITHDRAWN |
| 66-54 | Mar 17 | STATE PURCHASING AGENT. | Purchasing agent does not have the duty to let contracts for the erection of state educational buildings. |
| 66-54 | Sept 7 | ELECTIONS. CANDIDATES. POLITICAL PARTIES. | The name of Earl White should not appear on the ballot in the forthcoming General Election as a candidate for the office of Representative to the General Assembly from the Seventeenth District. |
| 66-54 | Nov 29 | ACQUIREMENT OF LANDS UNDER CONSTITUTION. | The power to acquire land is by the constitution of Missouri conferred upon the State Park Board; upon the Conservation Commission; upon the State Highway Commission for the purposes enumerated in subsection 3 of Section 30 of Article IV of the Constitution of Missouri; and upon any department authorized by the legislature for the purposes enumerated in Section 48 of Article III of the Constitution of Missouri. |
| 66-54 | Dec 14 | STATE PURCHASING AGENT. DIRECTOR OF PUBLIC BUILDINGS. | Contracts for labor and materials involved in the construction of appurtenances to buildings which involve engineering or mechanical skills should receive the approval of the director of public buildings. |
| 67-54 | Mar 11 | MUNICIPALITIES. TRAFFIC REGULATION. OFF-STREET PARKING. | (1) Municipality of appropriate population may issue revenue bonds to provide off-street parking facilities without submitting proposition to vote of the electorate. (2) Such bonds may not be retired from general revenue receipts of municipality. |
| 68-54 | Mar 1 | COUNTY FARM BUREAUS. TAXATION. | Counties of fourth class not authorized to levy tax for support and maintenance of county farm bureau subject to Sections 262.550 to 262.620, RSMo 1949, as amended. |
| 68-54 | Apr 19 | OPTOMETRY. OSTEOPATHS. | It is unlawful for an osteopath to advertise as a registered optometrist when not duly licensed by the State Board of Optometry to practice optometry in this State. |
| 68-54 | June 16 | COUNTY COURT. ASSESSOR. | It is mandatory duty of county court of fourth class county to furnish assessor of said county with office space, and if no space is available in county courthouse, then it must provide space somewhere else even to the extent of paying rent for an office for said assessor. |
| 68-54 | Dec 15 | COMMERCIAL MOTOR VEHICLES. RECIPROCITY | A commercial motor vehicle registered and owned in the state of Florida, which loads material in St. Louis, Missouri, transports it to Louisiana, Missouri, where it is unloaded, must also be registered in |

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| | | BETWEEN FLORIDA AND MISSOURI. | Missouri. |
| 69-54 | Nov 15 | Hon. James L. Paul | WITHDRAWN |
| 70-54 | Feb 1 | PROSECUTING ATTORNEY. CIVIL ACTIONS. COUNTIES. | 1. An action instituted by a Prosecuting Attorney, ex officio, for the abatement of an obstruction across a county road is an action brought by the State; 2. Although such action is unsuccessful by reason of adverse judgment or a continuance at any state of the proceedings no costs can be collected from the State; 3. In such a situation the county in which the action was begun would not be liable for such costs. |
| 70-54 | Apr 1 | MOTOR VEHICLE. DRIVER'S LICENSE. MUNICIPAL COURTS. CIRCUIT COURTS. DRUNKEN DRIVING. RECKLESS DRIVING. | Circuit court cannot revoke, but may suspend, driver's license for violation of city ordinance. Record of such conviction sent to Director of Revenue. Director cannot revoke license because of conviction of violation of ordinance, but can suspend if person is "habitual violator". |
| 70-54 | Apr 26 | ELECTIONS. ELECTION PRECINCTS. | (1) County court has exclusive jurisdiction to establish boundaries of election precincts for general, primary and special elections. (2) Elector may vote at any established precinct within the township of his residence, if such elector reside outside corporate limits of municipality. |
| 70-54 | June 10 | SCHOOL DISTRICT ELECTION. ABSENTEE BALLOTS. | Section 7, of Article VIII, of the Constitution of Missouri, authorizes the Missouri Legislature to enact laws providing that absentee ballots may be cast in school elections. Also that the control of elections for directors in the first election held in a reorganized district is under the control of the county board of education; that all subsequent elections are under the control of the district board of education, and that these boards are the proper bodies to issue absentee ballots; also that absentee ballots should not be rendered in a school district election by the county superintendent of schools in any instance. When such ballots are issued by the county superintendent of schools, such issuance is improper but that it does not nullify such absentee ballots when they are properly cast, and that under such circumstances such absentee ballots should be counted, just as though they had been issued by the proper party. |
| 70-54 | June 24 | PUBLIC NOTICES. | Maximum rate for publication of public notices on behalf of state or county is ten cents per column line of two inches length, twelve lines per column inch, in the absence of law authorizing or requiring use of larger type, wider spacing of lines or incorporation of emblems. |
| 70-54 | July 16 | Hon. Richard K. Phelps | WITHDRAWN |
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| 70-54 | July 29 | ELECTIONS. BALLOTS. COUNTY CLERKS. | Neither county clerk nor election officials have authority to remove candidate's name from primary election ballot once such ballot is finally printed. Notice of withdrawal of candidate received by county clerk too late to prevent candidate's name from appearing on printed ballot is ineffective. |
| 70-54 | Aug 25 | CITY. BOARD OF CURATORS. SEWER SYSTEM. WATER SYSTEM. UNIVERSITY OF MISSOURI. ROLLA SCHOOL OF MINES AND METALLURGY. | The City of Columbia may exact a reasonable charge from The Curators of the University of Missouri for the use of the Columbia sewerage system by the University of Missouri, said city may refuse to permit the University to use the City's sewerage system if reasonable charges made therefor are not paid. The foregoing is applicable to the City of Rolla and the School of Mines and Metallurgy. |
| 70-54 | Dec 1 | COUNTY HOSPITAL TRUSTEES. WHEN INDUCTED INTO OFFICE. | Newly elected County Hospital Trustees should qualify and take over their offices under the terms of Section 205.190, RSMo 1949, and should not wait until the first of January following, to take office. |
| 71-54 | Jan 22 | PUBLIC OFFICERS. NOTARIES PUBLIC. | (1). A public official, otherwise qualified, may be appointed and hold a Notary Public commission and use said commission for purposes outside the duties of the particular office; (2). Prosecuting Attorneys in this state, if Notaries Public, may administer oaths to and take affidavits of complainants in criminal cases. However, to avoid complications it would be best not to do so. |
| 71-54 | Feb 18 | SPECIAL ROAD DISTRICTS. DISSOLUTION. ORGANIZATION. | In order to form two special road districts out of one existing special road district, the existing district must be dissolved according to applicable law, and the two new districts organized out of the territory formerly comprised in the dissolved district. |
| 71-54 | Mar 16 | REAL PROPERTY. TAXATION. | Tracts of land omitted in previous years from assessment may be assessed when discovered, and the assessment of land or lots in numerical order or by plats in a land list in alphabetical order, shall be a sufficient assessment. However, no land can be sold for delinquent taxes under the Jones-Munger procedure for tax sales unless the notice of sale contains the names of all record owners or the names of all owners appearing on the land tax book. Therefore, it appears necessary in the situation presented by this opinion request that the owner(s) of record of the land in question must be determined before a sale for delinquent taxes can be had. |
| 71-54 | May 5 | OFFICERS. ARE CIVILLY LIABLE | A sheriff, or member of State Highway Patrol signing complaint for criminal warrant does so in individual and not in official capacity. If |

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| | | FOR DAMAGES WHEN SIGNING COMPLAINTS FOR ISSUANCE OF CRIMINAL WARRANTS, WHEN. | prosecution based on complaint terminates favorably to accused, who sues complainant in civil action for damages, latter has same legal rights in defending as any other citizen under same conditions. If he successfully alleges and proves that at the time complaint was signed he had probable cause to believe, and did believe, that the crime alleged was committed, and was committed by accused, this is a valid and complete defense and will render him immune from civil liability for damages in such action. |
| 71-54 | Sept 8 | FOOD AND DRUGS. MEAT. WHEN OWNER MAY LEGALLY SELL MEAT FROM HOME BUTCHERED LIVESTOCK. | One who butchers and sells meat from own livestock in grocery store in incorporated city may legally do so; a farmer may legally sell meat from his livestock directly to the grocery store or meat market. |
| 71-54 | Nov 15 | AGRICULTURE. | The Commissioner of Agriculture, his agents or licensed A and C graders do not have the authority to destroy, by dumping, illegal cream. |
| 71-54 | Nov 30 | Hon. W. H. Pinnell | WITHDRAWN |
| 72-54 | Jan 11 | MOTOR VEHICLES. POLICE DEPARTMENTS. | 1) Members of Police Departments of this State must produce satisfactory evidence of financial responsibility under the new Motor Vehicle Safety Responsibility Law of this State when involved in an accident. 2) Individual members of the Police Department of cities in this State while driving department automobiles are personally, legally liable for negligence involving other persons and property. |
| 72-54 | Jan 22 | ELECTION COMMISSIONERS. OFFICERS. | A president or vice-president of the Missouri Federation, Women's Democratic Club is not disqualified from holding the post of election commissioner of Clay County, Missouri by reason of holding such office in said club. |
| 72-54 | Feb 16 | PUBLIC LIBRARIES. SECOND CLASS CITIES. STATE AID. TAXATION. | Sections 93.435 and 182.140, RSMo 1949, empower a city of the second class to levy a library tax according to procedure of each section and that former section does not supersede latter, as both are in effect. A second class city, in order for its public library to be qualified for state aid authorized by Par. 2, 181.060 RSMo 1949, must levy a library tax under the provisions of either or both Sections 93.435 and 182.140 RSMo 1949. The tax rate must be equal to at least one half maximum provided by both Sections, or tax income must equal one dollar per capita for previous year according to publication of latest federal census. |
| 72-54 | Mar 25 | DISMISSAL OF AN | It is the opinion of this department that a person who has been |

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| | | APPEAL. | convicted of a misdemeanor in magistrate court and who has perfected an appeal to the circuit court, may dismiss his appeal, after which the judgment of the magistrate court is reinstated and becomes of full force and effect. |
| 72-54 | Apr 26 | Hon. Paxton P. Price | WITHDRAWN |
| 72-54 | May 5 | Hon. Paxton P. Price | WITHDRAWN |
| 72-54 | June 17 | ST. LOUIS POLICE. | Board of Police Commissioners of the City of St. Louis has no power to increase the compensation of commissioned personnel of the St. Louis Police Department; nor does it have the power to pay to such personnel a “cost of living” bonus. |
| 72-54 | July 28 | Mr. Paxton P. Price | WITHDRAWN |
| 72-54 | Oct 8 | VETERANS. TAXATION. | A motor vehicle owned by a veteran, who is a legal resident of Missouri, is subject to taxation although \$1600.00 of the purchase price of the motor vehicle was supplied by the administration of veterans’ affairs. |
| 72-54 | Nov 22 | COUNTY. STATE AUDITOR. | County’s classification changes if assessed valuation requirements are met although the State Auditor does not formally notify the county of such fact. The State Auditor may notify the county beyond the thirty-day period prescribed by Sec. 48.040, RSMo 1949, of changing classification. |
| 72-54 | Dec 27 | CRIMINAL SEXUAL PSYCHOPATHS. STATE HOSPITALS. MAGISTRATE COURTS. JURISDICTION OF MAGISTRATE COURTS. | Magistrate courts have jurisdiction to proceed against one properly charged before such court with the commission of a crime under the Criminal Sexual Psychopath Act, and to commit such person to the State Hospital at Fulton, Missouri pursuant to said Act. |
| 73-54 | May 5 | STATE HOSPITALS. APPROPRIATIONS. | The expense of a survey of the 5 State Mental Hospitals by the Central Inspection Board of the American Psychiatric Association is not comprehended within “ordinary and necessary operating expenses” or “ordinary and necessary expenses” within the meaning of the appropriations for “operations” contained in House Bill No. 383, 67th General Assembly. |
| 73-54 | July 26 | SPECIAL ROAD DISTRICT. ROAD AND BRIDGE TAX. | A law which requires that a portion of the money produced by the levying of a tax under authority of the first sentence of Section 12(a) of Article X, of the Constitution of Missouri, 1945, be paid over in whole or in part to a special road district, in proportion to the amount of money produced by tax of the property within such special road |

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| | | | district, is constitutional. |
| 73-54 | July 30 | DEPARTMENT OF PUBLIC HEALTH AND WELFARE. DIVISION OF MENTAL DISEASES. TRANSPORTATION CHARGES OF STATE PATIENTS. | Counties of residence of state patients at Missouri State School are not liable for transportation costs incurred in treatment. |
| 73-54 | Nov 29 | PERSONNEL. MERIT SYSTEM. STATE HOSPITAL. SUPERINTENDENT OF STATE HOSPITAL. STATE EMPLOYEES. EMPLOYEES. | Superintendent of state hospital may accept other employment if such employment does not conflict with his position as superintendent. |
| 73-54 | Dec 6 | ADMINISTRATIVE LAW. BARBERS. RULES AND REGULATIONS. | Barber Board does not have power to prescribe rule limiting period of time within which the eighteen-month apprenticeship must be spent. |
| 75-54 | May 12 | LICENSE. PHARMACY. TAXATION. | The ten dollar fee required for the issuance of a permit to engage in the pharmacy business by Section 338.220 RSMo, Cumulative Supp. 1953, is not a tax and must be paid by a purely charitable organization engaging in the pharmacy business. |
| 75-54 | May 24 | CONSTITUTION. BOARD OF PHARMACY. CRIMINAL LAW. | Section 338.260 RSMo, Cumulative Supp., 1953, can be enforced. |
| 75-54 | Dec 29 | CIRCUIT JUDGES. | A circuit judge may accept an appointment as arbitrator between private interests, and he may accept compensation therefor, so long as the acceptance of such position does not interfere with the proper discharge of his duties as circuit judge. |
| 76-54 | July 28 | ELECTIONS. BALLOTS. COUNTY CLERKS. | Withdrawal of candidate who has filed declaration of candidacy need not be acknowledged to be effective. Valid withdrawal cannot subsequently be withdrawn. Such person's name should not appear on ballot. |
| 76-54 | Aug 30 | INSURANCE. | Foreign insurance companies operating in Missouri under Missouri's stipulated premium plan law, Sections 377.200 to 377.460, RSMo 1949, are not subject to Missouri's corporation franchise tax levied under |

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| | | | Section 147.010, RSMo 1949. Missouri corporations organized and operating under said stipulated premium plan law are subject to said franchise tax unless they accept the provisions of Missouri's regular life insurance company law found at Sections 376.010 to 376.670, RSMo 1949. |
| 77-54 | Feb 19 | SCHOOLS. SCHOOL DISTRICTS. | The sale of a school building by the board of education of a reorganized school district without having advertised the same in accordance with Section 165.370, RSMo. 1949, is invalid. |
| 77-54 | May 26 | Hon. L. A. Rosner, D.V.M. | WITHDRAWN |
| 77-54 | July 14 | AGRICULTURE. COMMUNITY SALES LAW. | Application of the Missouri Community Sales Law to stated transactions. |
| 77-54 | July 21 | AGRICULTURE. STATE VETERINARIAN. VETERINARIAN. | If a person employed by a serum company receives in fact compensation for the administration of anti-hog cholera serum—virus and/or vaccines to swine, as distinguished from compensation for the sale thereof, he would be practicing “veterinary medicine” and required to procure a license under the provisions of Chapter 340, RSMo Cumulative Supp., 1953. |
| 77-54 | Oct 13 | VETERINARIANS. LICENSE. | An applicant for a nongraduate license under Section 340.040, Missouri Revised Statutes Cumulative Supplement, 1953, cannot be refused a license solely by reason of having been convicted. |
| 77-54 | Dec 27 | Hon. J. A. Rouveyrol | WITHDRAWN |
| 78-54 | Feb 1 | COUNTY COURT. ASSESSOR. | County Court in counties of third class may not employ clerical and stenographic personnel for the office of assessor other than is provided in Section 53.095, V.A.M.S. |
| 78-54 | Feb 3 | COUNTY. ROADS AND BRIDGES. | County court unauthorized to bring a civil action to determine if the road in question is a public road. Prosecuting Attorney, if satisfied that it is a public road, may bring suit to abate the obstruction across said road as a nuisance. |
| 78-54 | Feb 27 | BARBERSHOPS. CLOSING WEEKDAY. | The St. Joseph common council has no power to enact an ordinance prohibiting the opening of barbershops on a weekday (i.e., a day other than Sunday). |
| 78-54 | May 7 | COUNTY HEALTH CENTER. | Salary of dentists employed at county health center for treatment of indigent persons to be paid out of funds of such health center. |
| 78-54 | June 8 | CORPORATIONS. CRIMINAL LAW. LIQUOR CONTROL. | A person (and his barmaids) selling intoxicating liquor other than malt liquor, such person holding only a malt liquor license, should be charged with violation of Section 311.270 RSMo 1949, rather than |

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| | | | 311.550 RSMo 1949. The malt liquor license of a corporation will not be automatically revoked under the provisions of Section 311.720 RSMo 1949, unless said corporation shall have been convicted of violating the provisions of Chapter 311, RSMo 1949. Service of process in a criminal action against a corporation is by a summons, said summons to be served in the manner provided for service on a corporation in a civil action. |
| 78-54 | June 17 | PUBLIC HEALTH AND WELFARE. WOMEN. TAXATION. EQUITABLE CONVERSION. | The names of the owners of real estate, if known, should be placed in the real estate book, and that vendees under a contract of sale of real property may be the owners to be listed in the real estate book if the provisions of the contract are such as to invoke the doctrine of equitable conversion. |
| 79-54 | July 28 | MAGISTRATE COURT. MISDEMEANORS. | Opportunity and time to consult with friend or attorney must be given in Magistrate Court to person charged with misdemeanor at time of arraignment. Defendant may waive such right if continuance granted for such purpose and defendant cannot make bail should be committed to jail. |
| 79-54 | Oct 7 | SCHOOL DISTRICTS. COUNTY CLERK. COUNTY ASSESSOR. | Duties of county clerk and county assessor respective when boundary line between school districts is in dispute. |
| 81-54 | Feb 15 | BOUNTIES. | There is no statute in this State authorizing County Courts of any county of any class in this State to set and pay out of the county treasury bounties on foxes or fox puppies. |
| 81-54 | Apr 7 | COUNTY ASSESSORS. VACANCIES. | County assessor elected at 1952 general election served until death in December 1953. Governor subsequently appointed one to fill vacancy under authority of Sections 53.010 and 105.030, RSMo 1949, and appointee could not serve full unexpired term of deceased. Successor must be elected for unexpired term at general election in 1954, but such term will not begin until September 1, 1955. |
| 81-54 | Apr 30 | ANIMALS. STOCK LAW. | Cattle may be allowed to run at large in a township which has not voted to enforce the provisions of Chapter 270 concerning the restraint of animals from running at large, even though the owner of said cattle may be a resident of another township which has voted to enforce the law restraining animals from running at large. |
| 81-54 | Apr 30 | CIRCUIT CLERKS. FEES. | Change of venue fee paid in to the county treasury under Section 508.230, RSMo 1949. |
| 81-54 | May 20 | RESERVE MILITARY FORCE. SKELETAL BASIS. | The State of Missouri may organize and maintain and pay the expenses of such maintenance of a cadre reserve military force without the consent of Congress or authorization by the Federal Government. |

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| 81-54 | June 14 | SCHOOLS. SCHOOL FUNDS. SCHOOL BUS TRANSPORTATION. | Children may not be transported to private schools at the expense of the public school district. |
| 81-54 | Sept 28 | CHILDREN. PUPILS. SCHOOL DISTRICTS. TUITION. | A child having a temporary or permanent home in a school district, said child being unable to pay his tuition, and whose parents do not contribute to his support, is entitled to attend the schools of that district without payment of tuition. |
| 81-54 | Oct 15 | STOCK LAW. FOREST CROP LANDS. | In a township or county in which it is lawful for domestic animals to run at large, a person who wishes to keep such animals off of his premises must fence against them. |
| 81-54 | Dec 1 | Hon. D. W. Sherman, Jr. | WITHDRAWN |
| 82-54 | June 14 | ELECTIONS. VOTING. WAGES. | Employee whose working day ends at 4:30 P.M. is entitled to full day's pay when employer dismisses him from work 3:30 P.M. election day. |
| 84-54 | June 1 | CITIES, TOWNS AND VILLAGES. LICENSE. MERCHANTS. | City of third class does not have power to exact license fee from nurseryman. |
| 84-54 | Oct 22 | NAVIGABLE RIVERS— OWNERSHIP OF SAND AND GRAVEL IN THE BEDS OF SUCH RIVERS. | 1) The Osage River in Missouri is a navigable stream; 2) Miller County is the owner of the deposits of sand and gravel in the bed of the Osage River in said county as parts of islands formed in navigable waters of this State, and holds the same for school purposes; 3) The county may sell such property for school purposes. |
| 86-54 | Mar 16 | MISSOURI STATE SCHOOL. | Division of Mental Diseases having established a location at Higginsville, Missouri, as a unit of the Missouri State School in pursuance of Section 202.590, RSMO 1949, it is the opinion of this office that the money appropriated for the use of the Missouri State School for "erection of a building or buildings suitable for housing 500 additional patients and equipment for such buildings" may be used to erect such building or buildings at the Higginsville, Missouri, location. |
| 86-54 | July 26 | TAXES. | 1) The County Collector is empowered under Section 140.150, et seq., RSMo 1949, (Jones-Munger Act) to sell a leasehold interest in land and a building located thereon assessed separately from the fee and against the lessee; 2) The conveyance authorized by Section 140.420, RSMo 1949, should be in the usual form describing the lessee's interest in the land and the building; 3) It would not be proper to assess said leasehold and building to the owner of the fee and the lessee jointly. |
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| 86-54 | Sept 29 | SCHOOLS. SCHOOL DISTRICTS. SCHOOL FUNDS. | Funds derived from school lunch program and from school athletic and dramatic funds are school district monies which must be disbursed in accordance with Sec. 165.110, MoRS, Cum. Supp., 1953. If school board uses district funds in purchasing sale of candy and soda, such funds must also be disbursed in the same manner. |
| 86-54 | Oct 29 | TAXATION AND REVENUE. TOWNSHIPS. | Township entitled to taxes derived from imposition of township levy on real and personal property located therein according to general law. |
| 87-54 | Mar 4 | CIRCUIT COURTS. GRAND JURIES. WHEN CONVENED. | Section 540.020 RSMo 1949, providing that grand jury be convened upon order of judge of court of record having jurisdiction of felonies is directory rather than mandatory. Does not require grand jury convened at least once during certain period of time. Calling of grand jury discretionary with judge, who may order same convened at such times as he deems necessary. |
| 87-54 | Aug 16 | Hon. J. C. Sullivan | WITHDRAWN |
| 87-54 | Oct 13 | COUNTIES. COUNTY COURT. COUNTY TREASURER. | Payment of warrant by county treasurer for services of an attorney representing individual members of the county court in contempt proceedings and habeas corpus proceedings, invalid. |
| 88-54 | Jan 28 | CORONERS. | Coroner in City of St. Louis as such has no authority to order the arrest or detention of persons suspected of complicity in crime causing death by violence or of a material witness thereto, prior to the holding of inquest. |
| 88-54 | Feb 2 | CORONERS. DEAD BODIES. ANATOMICAL BOARD. | Specimens of human bodies collected by previous coroners of the City of St. Louis should be disposed of in accordance with the provisions of Chapter 194.120, et seq., RSMo 1949. |
| 88-54 | Mar 2 | Hon. Stewart E. Tatum | WITHDRAWN |
| 88-54 | Nov 5 | SHERIFFS. | Mileage to be allowed sheriff of Jasper County for transportation of prisoners between Joplin and Carthage. |
| 88-54 | Dec 28 | SCHOOL DISTRICTS. TAXATION. MANUFACTURER'S TAX. PERSONAL PROPERTY TAX. | Tangible personal property of manufacturing corporations subject to taxation, should be assessed in the school district in which the property is located. |
| 89-54 | Jan 11 | INHERITANCE TAXES. PROBATE COURT TO DETERMINE WHEN | Under Sections 145.150, RSMo. 1949, in every instance when administration proceedings are pending in probate court having jurisdiction thereof, immediately upon filing of inventory and |

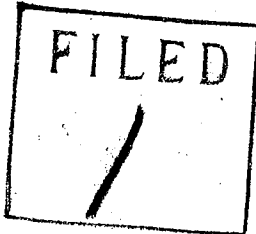
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| | | ESTATE SUBJECT TO. | appraisement, if in court's opinion estate is not subject to inheritance tax, it is mandatory duty of court to enter such finding and opinion in the records of said court. If estate appears subject to tax, the court shall set a day for hearing and determination of tax. Before such hearing, the court may, upon its own motion, or that of any interested party, appoint one to appraise estate property, interest therein, or income therefrom, at clear market value subject to tax, and make written report of appraisement to court. If court finds report correct, then it is mandatory duty of court to make an order approving report and assessing tax at amount shown therein. Said finding and order shall be entered in records of said court. |
| 89-54 | Feb 18 | COUNTY TREASURER. TOWNSHIP ORGANIZATION. COUNTIES. ELECTIONS. | The term of the treasurer of Daviess county will expire on December 31, 1954; that the office may be filled by appointment by the governor at any subsequent time; that the treasurer, whose term expired on December 31, 1954, may hold over in this office until her successor is duly elected or appointed and qualified; that she should not have been a candidate for reelection in 1952 nor in 1954. Further, that she may serve until April 1, 1957, unless her office is filled by appointment by the Governor. |
| 89-54 | Apr 7 | REORGANIZED SCHOOL DISTRICT. | When a school district becomes a part of a reorganized district, it loses its former identity; it cannot thereafter be removed from or voted out of the reorganized district, for the reason that it has lost its original identity, and for the further reason that even if it had not lost its former identity, no such powers are vested in the reorganized district; that if and when the reorganized district becomes dissolved, all of the territory formerly comprised in it becomes unorganized territory. |
| 89-54 | Sept 15 | ELECTIONS. JUDICIAL COMMITTEE. QUORUM. | Fred C. Bollow not the legal nominee of the Democratic party to the office of Circuit Judge of the Second Judicial Circuit because there was no quorum of the judicial committee present at the meeting at which he was nominated on July 29, 1954. |
| 89-54 | Nov 29 | SWAMP AND OVERFLOWED LANDS. PATENTS. | 1) Patents should be issued for swamp and overflowed lands to counties in which such lands lie, by the State, under Sec. 241.080, RSMo 1949. 2) When such patents to such lands have been issued by the State to counties and when payment in full has been made for such lands by the purchaser, the County Court shall cause the clerk of said court to issue to the purchaser or his heirs or assigns, a patent under Sec. 241.220, RSMo 1949. |
| 90-54 | July 30 | STATE PARKS. APPROPRIATION. | Missouri State Park Board unauthorized to establish revolving fund for payment of expenses of concessions in state parks. |
| 92-54 | Jan 11 | COURT REPORTERS. COUNTY COURTS. | County courts not required to defray any costs of supplies used by court reporter in preparing transcripts called for in Section 485.100, |

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| | | | RSMo 1949. |
| 92-54 | July 21 | TAXATION. STEAMBOATS. | Steamboat engaged in interstate commerce and owned by Delaware company is not subject to ad valorem taxes in Missouri. |
| 93-54 | Mar 11 | CRIMINAL LAW. | Priority of service of terms of punishment. |
| 93-54 | Mar 12 | Col. Hugh H. Waggoner | WITHDRAWN |
| 93-54 | June 7 | LOTTERIES. "AUTOMOBILE GAME" IS A LOTTERY. | "Automobile Game" consisting of numbered rectangular track over which small automobile is made to run is game of chance rather than of skill. For payment in advance of cash fee, one is permitted to operate device. Device is operated when the player first selects number, then propels automobile so that it hits bumpers at each end of track. Only when automobile stops on previously selected number is player awarded a prize. Said operation involves consideration, chance and prize, and is a lottery within the meaning of Missouri lottery statutes, particularly Section 563.430 RSMo 1949, declaring the making or establishing of a lottery a crime. |
| 93-54 | Aug 9 | CRIMINAL LAW. SUPREME COURT RULE 21.14. | Persons arrested without warrant may, during the twenty-hour detention period, apply to a judge or magistrate of a court having original jurisdiction to try criminal offenses in the county where such person is held for fixing of bail for subsequent appearance in the same or another court. |
| 93-54 | Sept 29 | STATE HIGHWAY PATROL. | Superintendent may assign patrolman to Capitol grounds and may arrest for violations of law observed by him. |
| 93-54 | Oct 4 | INTERSTATE COMMERCE. MOTOR VEHICLES. RECIPROCITY. | (1) Motor carrier operating in described fashion is engaged in "interstate commerce." (2) Reciprocity for commercial motor vehicle registration between states of Missouri and Delaware. |
| 93-54 | Nov 29 | HIGHWAY PATROLMEN. ARREST. MOTOR VEHICLES. | A highway patrolman may arrest without warrant a person who the patrolman, at the direction of the director of revenue, calls upon to surrender his motor vehicle registration and license, if the highway patrolman can determine as of that time that such person is willfully failing to turn in to the director of revenue his motor vehicle registration and license. |
| 93-54 | Dec 15 | ELECTIONS. NOMINATIONS. | Tie vote for candidates for nomination to be determined by lot by canvassers of returns of election. |
| 96-54 | Feb 4 | SCHOOLS. SCHOOL DISTRICTS. | School district temporarily combined with another district under Sec. 161.100, RSMo 1949, must employ teacher and show kind of certificate held by teacher in order to qualify for maximum apportionment of state school money. |

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| 96-54 | Mar 5 | FEES. HIGHWAY ENGINEERS. PUBLIC OFFICERS. SALARIES. | County highway engineers of counties of first class are entitled to an annual salary of \$8,000.00; county highway engineers of counties of the second class are entitled to an annual salary, to be fixed by the county court, of not more than \$4,000.00; and county highway engineers of counties of the third and fourth classes shall receive as compensation an amount fixed by the county court, not to exceed ten dollars per day in counties of the third class, and not more than \$8.00 in counties of the fourth class for each day actually served as county highway engineer. |
| 96-54 | Mar 11 | Hon. James J. Wheeler | WITHDRAWN |
| 96-54 | Apr 7 | Hon. W. C. Whitlow | WITHDRAWN |
| 96-54 | Apr 19 | COURTS. FINES. CRIMINAL LAW. MAGISTRATE COURT. PROSECUTING ATTORNEY. | Prosecuting attorney may dismiss an affidavit filed by him charging a person with the commission of a crime in another state, and that said person has fled therefrom. Fines assessed in magistrate court are judgments which may be collected, unless barred by Section 516.350, RSMo 1949. |
| 96-54 | May 28 | ROADS AND BRIDGES. | Bridge constructed by special road district remains property of such district upon abandonment of public road whereon situated. |
| 96-54 | June 10 | ELECTIONS. SALE OF INTOXICATING LIQUOR. | It is illegal to dispense intoxicating liquor within the hours prescribed on the election day of any school director, fire prevention district director or sewer district trustee. |
| 96-54 | June 28 | OFFICERS. | Duties of prosecuting attorney and those of trustee of a county health center of the same county are repugnant or inconsistent to each other. Said offices are incompatible and one person may not hold both at the same time. Duties of county superintendent of schools and those of trustee of a county health center of same county are not repugnant or inconsistent to each other. Said offices are compatible and one person may hold both at same time. |
| 96-54 | June 30 | Mr. Hubert Wheeler | WITHDRAWN |
| 96-54 | Aug 16 | Hon. J. Patrick Wheeler | WITHDRAWN |
| 96-54 | Aug 20 | Hon. Jay White | WITHDRAWN |
| 96-54 | Oct 4 | COUNTY COURT. TREASURER. COUNTY | County court of a third class county may not appoint a deputy county treasurer; a county depository may honor checks signed by a de facto deputy to the county treasurer if it has no knowledge of the invalidity |

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| | | DEPOSITORY. DE FACTO OFFICERS. DEPUTIES. OFFICERS. | of the appointment of the deputy. |
| 96-54 | Dec 14 | COUNTY TRUSTEE. DRAINAGE DISTRICT. TAXATION. | A drainage district is not entitled to participate in the surplus of proceeds received from lands sold by a county trustee under the provisions of Section 140.260, RSMo 1949. A drainage district does not have the authority to compromise delinquent drainage taxes. |

TAXATION: Members of the Commissioned Corps of the Public Health
INCOME: Service actively serving prior to July 3, 1952, entitled
to \$3,000. income tax exemption per Section 143.105;
but not after said date.



February 8, 1954

Mr. T. R. Allen
Supervisor, Income Tax Unit
Department of Revenue
Jefferson City, Missouri

Dear Mr. Allen:

Reference is made to your request for an opinion of this
office which request reads in part as follows:

"This department desires a written opinion
in connection with the administration of
Section 143.105, captioned, Service Pay of
Members of the Armed Forces Not Taxable,
When, as to whether or not the additional
\$3,000 military exemption is applicable to
members of the Department of Health, Education
and Welfare, United States Public Health
Service."

* * * * *

"I believe your ruling should cover the matter
herein involved up to a period of July 3, 1952
and whether or not in the event of your findings
there would be a differentiation of the treatment
of this additional exemption as compared before
that date and after."

Section 143.105, V.A.M.S. enacted by the 66th General Assembly,
to which you refer, provides as follows:

"The amount of service pay up to but not
exceeding three thousand dollars received
by a member of the armed forces of the United
States on active duty in any one calendar
year shall not be taxable and need not be

Mr. T. R. Allen

included in his state income tax return for the year 1950 and every year thereafter. No person receiving a dishonorable discharge shall receive this exemption. The administrator, executor or next of kin of any deceased member of the armed forces may claim such exemption for such person."

Very briefly, your question is whether the \$3,000. exemption granted in the above provision may be claimed by the Commissioned Corps of the Public Health Service both prior to and after July 3, 1952.

Your attention is first directed to Executive Order No. 9575 (10 F.R. 7895) issued on June 21, 1945, and signed by the President of the United States which provides in part, as follows:

"By virtue of the authority vested in me by section 216 of the Public Health Service Act, approved July 1, 1944, 58 Stat. 691 (this section); Title I, of the First War Powers Act, approved December 1, 1941, 55 Stat. 838 (sections 601-605 of Appendix to Title 50); and as President of the United States and Commander in Chief, I hereby declare the commissioned corps of the Public Health Service to be a military service and a branch of the land and naval forces of the United States during the period of the present war. The commissioned corps of the Public Health Service during such period shall be subject to the Articles for the Government of the Navy to the extent prescribed in the following regulations:"

On June 9, 1952, Executive Order No. 10349, superseding Executive Order 9575 F.R. 3769) was issued declaring the Commissioned Corps of the Public Health Service to be a military service in substantially the same language noted in the Order above with the further language "From the date of this Order to and including June 1, 1952." Said Order reads, in part, as follows:

"By virtue of the authority vested in me by section 215 of the Public Health Service Act (58 Stat. 690), and the authority vested in me by section 216 of that Act (58 Stat. 690) as continued by the Emergency Powers Interim Continuation Act, approved April 14, 1952 (Public Law 313, 82nd Congress), and as President of

Mr. T. R. Allen

the United States and Commander in Chief of the land and naval forces of the United States, I hereby declare the Commissioned Corps of the Public Health Service to be a military service and a branch of the land and naval forces of the United States from the date of this order to and including June 1, 1952. * * *

Thereafter, Executive Order No. 10349 was amended by Executive Order No. 10356 (17 F.R. 4967) by striking out June 1, 1952 and inserting in lieu thereof June 15, 1952. Said Order was further amended by Executive Orders 10362 (17 F.R. 5413) and 10367 (17 F.R. 5929) extending the dates to June 30, 1952, and July 3, 1952, respectively.

The latter noted Order provides as follows:

"By virtue of the authority vested in me by section 216 of the Public Health Service Act (58 Stat. 690), as continued by the Emergency Powers Interim Continuation Act (Public Law 313, 82nd Congress) as amended by joint resolutions approved May 28, 1952, June 14, 1952, and June 30, 1952, and as President of the United States and Commander in Chief of the land and naval forces of the United States, I hereby amend Executive Order No. 10349 of April 26, 1952, entitled 'Declaring the Commissioned Corps of the Public Health Service To Be a Military Service and Prescribing Regulations therefor', as amended by Executive Order No. 10356 of May 29, 1952, and Executive Order No. 10362 of June 14, 1952, by striking out 'June 30, 1952' appearing in the introductory paragraph of the order and inserting in lieu thereof 'July 3, 1952.'"

From and after the date of July 3, 1952, we find no further Executive Order declaring the Commissioned Corps of the Public Health Service to be a branch of the military and, therefore, we must conclude that such status ceased on that date.

It is our opinion that persons actively serving in the Public Health Service after the effective date of Section 143.010 and prior to July 3, 1952, were entitled to claim the \$3,000. exemption provided since they were serving in a military service

Mr. T. R. Allen

so declared by the President of the United States under authority of law. However, after the expiration of Executive Order No. 10367 on July 3, 1952, such persons ceased to be in the military service and therefore could not claim the exemption after that date.

CONCLUSION

Therefore it is the opinion of this office that members of the Commissioned Corps of the Public Health Service actively serving after the effective date of Section 143.105 and prior to July 3, 1952, are entitled to claim the \$3,000. exemption provided in the above noted section.

We are further of the opinion that such persons ceased to be in the military service after the expiration of Executive Order No. 10367 on July 3, 1952, and therefore would not be entitled to claim the exemption allowed to members of the armed forces of the United States.

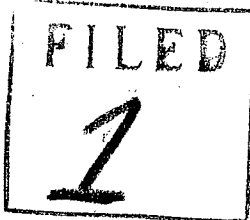
This opinion, which I hereby approve, was written by my assistant, Mr. D. D. Guffey.

Yours very truly,

JOHN M. DALTON
Attorney General

DDG:mw

COUNTY COURTS: County court in county under township organiza-
ASSESSORS: tion does not have authority under Section 53.190
to remove township clerk and ex officio township
assessor.



August 9, 1954

Honorable Walter E. Allen
Prosecuting Attorney
Linn County
Bettelheim Building
Brookfield, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"I would like your opinion on the follow-
ing question:

"Does the County Court of a County operat-
ing under the Township form of government
have the power under Section 53.190 Revised
Statutes of Missouri, 1949, to remove from
office the Township Assessor for violating
the provisions of the law as described in
that Section or does Section 53.190 refer
only to County Assessors under the County
Unit plan of government?"

Section 53.190 RSMo 1949, which you have referred to in
your letter of inquiry, reads as follows:

"Every assessor who shall knowingly fail
to perform any duty enjoined upon him by
law, in the time prescribed, shall be re-
moved from office by the county court, who
shall appoint another in his stead. Such
new assessor shall take a like oath and
give a like bond as required of the first,
and the county court shall ascertain the
amount necessary to complete the assessment
of the county and shall institute proceed-
ings upon the bond of such delinquent
assessor for the collection of such amount
from him and his sureties."

Honorable Walter E. Allen

Our research into the question you have presented leads us to the conclusion that the power conferred upon the county court under the provisions of the statute quoted does not extend to the removal from office in a county under township organization of a township clerk and ex officio township assessor. Our conclusion is predicated upon the following reasoning.

In the first instance there is no "assessor," as such, in counties under township organization. Section 65.110, providing for township officers, reads as follows:

"There shall be chosen at the biennial election in each township one trustee, who shall be ex officio treasurer of the township, one township collector, one township clerk, who shall be ex officio township assessor, and two members of the township board."
(Emphasis ours.)

In view of the fact that the person elected as township clerk serves in a dual capacity, one of which includes the duties of an assessor, it becomes apparent that there is no officer in the township against whom the provisions of Section 53.190 RSMo 1949 might be directed. It has been repeatedly held that county courts are courts of limited jurisdiction and may not exercise powers beyond those specifically conferred upon them or necessarily implied to effectuate the discharge of official duties. This limitation is more applicable since the adoption of the Constitution of 1945 wherein county courts have been deprived of their status as courts of record and remain now primarily as fiscal managing agencies of the counties. Consequently, the power to remove an "assessor" would not be construed to extend to the removal of a "township clerk and ex officio township assessor."

Secondly, we note that Section 53.190 authorizes the county court, in counties wherein such statute is applicable, to appoint a successor to an assessor who has been removed. Examination of the statutes relating to vacancies in office in counties under township organization discloses that Section 65.200 RSMo 1949 contains a complete scheme for the filling of vacancies in township offices. This section reads as follows:

"Whenever any township shall fail to elect the proper number of officers to which such township may be entitled, or when any person elected or appointed shall fail to qualify, or when any vacancy shall happen in

Honorable Walter E. Allen

any township office from any cause, it shall be lawful for the township board to fill such vacancy by appointment, and the person so appointed shall hold the office and discharge all the duties of the same during such unexpired term, and until his successor is elected or appointed and qualified, and shall be subject to the same penalties as if they had been duly elected; provided, that any vacancy in the township board shall be filled by appointment of the county court."

It is noted that Section 53.190 RSMo 1949 became a part of our statutory law in 1835, whereas Section 65.200 RSMo 1949 was enacted at a much later date, viz., 1872. The later adoption of the comprehensive scheme for the filling of vacancies in township offices indicates to us a legislative intent that as to counties under township organization Section 53.190 RSMo 1949 is inapplicable.

In the foregoing opinion we have assumed the constitutionality of all statutes mentioned.

CONCLUSION

In the premises, we are of the opinion that a county court of a county operating under township organization may not remove from office under the provisions of Section 53.190 RSMo 1949 a township clerk and ex officio township assessor.

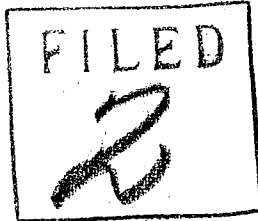
The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

VITAL STATISTICS: Division to record births proven under provisions of Section 193.200, RSMo 1949, and upon payment of statutory fees to issue certified copies of such records.



March 16, 1954

Honorable James R. Amos, M.D.
Director, Division of Health
State of Missouri
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"Section 193.200, Missouri Revised Statutes 1949 provides that a person under certain conditions can file a certificate either with us under our procedure or may follow the procedure set forth by any court. We have received some Circuit Court orders setting forth the date and place of birth of individuals who have used this Section without using our procedure. The attorney presenting these orders believes that Section 193.220 does give him the privilege to file such orders with us in spite of the fact that the procedure outlined in it refers to another matter. Our question is, does the law provide for us to file the orders as result from Section 193.200 and to issue certified copies therefrom?"

Section 193.200, RSMo 1949, referred to in your letter of inquiry reads as follows:

Honorable James R. Amos, M.D.

"A person born in this state, or a resident of Missouri born outside of this state whose birth is not recorded in any other state, may file, or amend a certificate after the time herein prescribed, upon submitting such proof as shall be required by the division, or by any court." (Emphasis ours).

Your inquiry is directed to the underscored portion of this statute. The language is definite and unambiguous and by its terms authorizes the filing of certificates of birth upon proving to the satisfaction of any court the truth of the facts alleged with respect to such births. Under these circumstances no occasion arises for construction of the statute nor for the application of the rules of interpretation which are customarily invoked in arriving at the intent of the lawmakers. We direct your attention to *Norberg County Clerk v. Montgomery*, 173 S.W. (2d) 387, wherein it was said by the Supreme Court of Missouri En Banc, l.c. 390:

"We think the language of the Statute is plain and unambiguous, and the intent of the Legislature is clear, as we have already found. 'Rules for the interpretation of statutes are only intended to aid in ascertaining the legislative intent, "and not for the purpose of controlling the intention or of confining the operation of the statute within narrower limits than was intended by the lawmaker.'" Sutherland on Statutory Const., Sec. 279. If the intention is clearly expressed, and the language used is without ambiguity, all technical rules of interpretation should be rejected.' State ex rel. Wabash Ry. Co. et al. v. Shain, 341 Mo. 19, 106 S.W. 2d 898, loc. cit. 899, 900."

From the foregoing it is apparent that the division is required to record certified copies of judgments entered by courts acting upon petitions for the establishment of the facts of the births of registrants.

Honorable James R. Amos, M.D.

Your further question is directed to the necessity of the division supplying certified copies of such orders or judgments after recordation. In this regard your attention is directed to the provisions of Section 193.190, RSMo 1949, reading in part, as follows:

"The state registrar shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under provisions of this law, for the making and certification of which a fee of fifty cents shall be paid by the applicant to the state department of revenue. * * *"

This statute discloses that a duty has been enjoined upon the division to supply certified copies of records upon payment of the fee prescribed in the statute.

CONCLUSION

In the premises we are of the opinion that the Division of Health, Bureau of Vital Statistics, is required to accept for recordation certified copies of judgments entered by courts establishing the facts relating to the birth of persons desiring to register such births in the manner provided by Section 193.200, RSMo 1949.

We are further of the opinion that certified copies of such records must be supplied to persons tendering the statutory fees prescribed by Section 193.190.

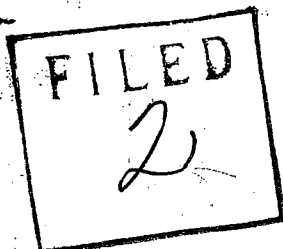
The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

WFB:vlw

PURE FOOD AND DRUG ACT: Duty of enforcing embargo provisions
CIRCUIT ATTORNEY: of Missouri Food and Drug Law devolves
upon circuit attorney for City of
St. Louis.



August 12, 1954

James R. Amos, M. D., Director
Division of Health
State of Missouri
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"We recently embargoed over 3,000 cases
of salad olives, packed by a manufacturer
located in the city of St. Louis, Missouri.
Laboratory analysis of these olives showed
that they were contaminated with insects,
insect excreta, pupae and larvae in various
stages of development, and in some cases a
considerable amount of sand, grit and other
extraneous matter.

"This information was transmitted to our
representative in St. Louis, Missouri, Mr.
Edwin Bolfig, who in turn took the infor-
mation to the City Prosecuting Attorney's
Office and asked for assistance in securing
condemnation of these olives.

"Mr. Bolfig was informed by the City Prose-
cuting Attorney that this was not his duty
but was the duty of the Circuit Attorney's
Office. Mr. Bolfig then proceeded to the
Circuit Attorney's Office and the Circuit
Attorney advised him that this was the duty
of the Prosecuting Attorney's Office.

"Since neither of these officials felt that
the enforcement of the State Food and Drug
Laws, Chapter 196, was his responsibility,
it will be appreciated if you would give us

James R. Amos, M. D., Director

an official opinion concerning this matter since we are desirous of knowing who is responsible for enforcing the State Food and Drug Laws in the city of St. Louis, Missouri."

Provisions relating to the enforcement of the Missouri Pure Food and Drug Act are found in Section 196.035 RSMo 1949, reading, in part, as follows:

"It shall be the duty of the prosecuting attorney in any county or city in the state, when called upon by the division of health, or any of its assistants, to render any legal assistance in his power to execute the laws and to prosecute cases rising under the provision of Sections 196.010 to 196.120.* * *" (Emphasis ours.)

Looking to other statutes relating to the circuit attorney in the City of St. Louis, we find the following provisions contained in Section 56.430 RSMo 1949:

"At the general election to be held in this state in the year 1948, and every four years thereafter, there shall be elected in the city of St. Louis one circuit attorney, who shall reside in said city, and shall possess the same qualifications and be subject to the same duties that are prescribed by this chapter for prosecuting attorneys throughout the state, and the city register of said city shall transmit to the secretary of state an abstract of the votes given for each candidate for circuit attorney in said city, in the same manner as is required by law of clerks of county courts." (Emphasis ours.)

It is clear that under the quoted provisions of Section 196.035 the duties relating to enforcement of the Missouri Pure Food and Drug Act have been placed upon the prosecuting attorneys in the various counties. Aside from this specific provision we find further that under the provisions of 56.060 RSMo 1949, the duty of representing the State generally in all civil matters has been placed upon such official. This section reads, in part, as follows:

James R. Amos, M. D., Director

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, * * *."
(Emphasis ours.)

It is our thought that the confusion in connection with this matter has arisen by virtue of the existence of both a "circuit attorney" and a "prosecuting attorney" in the City of St. Louis. However, examining the statutory duties imposed upon the prosecuting attorney for such city, we find that such duties are not broad enough to encompass proceedings brought under the statutes referred to in your letter of inquiry. The duties of such official are delineated in 56.490, RSMo 1949, reading as follows:

"The prosecuting attorney of the St. Louis court of criminal correction shall attend to and prosecute all suits brought therein, and he shall appear for the state in all cases appealed from said court to the St. Louis court of appeals; the prosecuting attorney shall attend at his office, on each secular day of the week, for the purpose of preparing all complaints, affidavits, informations and pleas required by law to be lodged in said court."

It is apparent that the duties of the prosecuting attorney in the City of St. Louis are limited to the prosecution of misdemeanors in the St. Louis Court of Criminal Corrections.

It is true that under the provisions of Section 196.025 RSMo 1949, acts constituting adulteration or misbranding of food products such as are described in your letter of inquiry and other violations of the Pure Food and Drug Act are made misdemeanors. It therefore would be the duty of the prosecuting attorney in the City of St. Louis to institute any criminal proceedings which might arise as a result of the commission of such acts.

CONCLUSION

In the premises, it is the opinion of this department that the duty of enforcing the embargo provisions of the Missouri Pure Food and Drug Act within the City of St. Louis rests upon the circuit attorney for such city.

James R. Amos, M.D., Director

It is the further opinion of this department that criminal proceedings based upon violations of the Pure Food and Drug Act should be prosecuted by the prosecuting attorney of such city.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

DIVISION OF HEALTH: Orders for alterations to be made in build-
HOTELS: ings used as hotels, to be given to the owner,
proprietor or agent in charge of said buildings,
when such building does not meet the require-
ments of a building used for a hotel by Missouri law, can only be
given by the Director of the Division of Health or by a deputy, who
may be the deputy of food and drug administration, when such deputy
is vested with such authority by the Director of the Division of
Health. The closing order for a hotel to be given following non-
compliance with the order of alterations in the building mentioned
above, can only be given by the same person under the same condi-
tions as noted above; that is to say, the Director of the Division
of Health or by a deputy invested with such authority by the Direc-
tor of the Division of Health.

August 20, 1954

James R. Amos, M.D.
Director, Division of Health
Department of Health and Welfare
Jefferson City, Missouri



Dear Sir:

Your recent request for an official opinion reads as fol-
lows:

"I am attaching, herewith, a letter from one
of our District Food and Drug Representatives
concerning the Jefferson Hotel at Joplin, Mis-
souri.

"You will note that Mr. Stewart Tatum, Prose-
cuting Attorney for Jasper County, has raised
a question concerning the authority of our
Food and Drug Inspectors to issue a closing
order for a hotel as provided under Chapter
315, Revised Statutes of Missouri, 1949.

"Mr. Tatum is apparently basing his decision,
concerning this matter, upon Section 315.020,
which states in the last sentence of the sec-
tion: 'If at the expiration of the required
notice such owner or agent of the building so
occupied refuse or fail to comply with said
sections mentioned in such notice then it shall
be the duty of the Director of the Division of
Health to close said hotel until such require-
ments are complied with'.

"It has always been our understanding that the
Director of the Bureau of Food and Drugs and
the District Representatives of the Bureau of
Food and Drugs are acting under the orders and
directions of the Director of the Division of
Health and are, therefore, agents acting in
the name of the Director of the Division of

James R. Amos, M.D.

Health, and that notices issued by them in accordance with the requirements of Section 315.020 would be sufficient to satisfy the requirement of said section. We would, therefore, appreciate an official opinion as to the legality of the District Food and Drug Inspectors issuing work orders for the repairs or alterations to be made on such hotels, and the subsequent issuance of a closing order as provided for in Section 315.020.

"It would of course be physically impossible for the Director of the Division of Health to personally inspect each hotel within the state of Missouri and issue a closing order in person for those who fail to comply with the requirements of Chapter 135. It seems to me that it was the intent of the legislature to provide for the delegation of such authority and powers to responsible district personnel.

"Since this same question has arisen concerning the delegation of authority to close food handling establishments under Section 196.190 through 196.265, particularly Section 196.240, 196.245 and 196.250, we would like to call your attention to the fact that in the 1939 Revised Statutes, Section 9900 reads as follows: 'Any duty by this chapter imposed upon the state food and drug commissioner may, with equal force and authority, be performed by any deputy state food and drug commissioner, or any inspector of state food and drug department, as directed by the state food and drug commissioner. (R.S. 1929, Sec. 13051).'

"It is, therefore, my belief that it was the intent of the legislature in both the case of a food handling establishment and a hotel to permit the delegation of authority to district representatives to issue work orders or instructions for the correction of sanitation defects and to close those establishments who are endangering the health and welfare of the people of the state.

"In the event our present method of operation is not legal, please indicate the correct legal procedure."

The letter to which you refer, and which you enclosed, reads:

James R. Amos, M.D.

"I have just returned from a visit with Stewart Tatum, Prosecuting Attorney, Jasper County, in regard to the Jefferson Hotel, Joplin, Missouri.

"Mr. Tatum states that the law reads that all orders for changes to be made as well as closing orders must come from the Director and therefore he is unable to act. He is more than willing to take up the matter after the notices and closing orders along with the time lapse as required by law is done.

"To review our record of which you have had copies of each are as follows:

"February 4, 1954 inspection and work order issued.

Sect. 315.080, 315.110, 315.120
Sect. 315.180 and post rates

"May 20, 1954 inspection and work order amended to include

Sect. 315.090

"June 10, 1954 letter to Mr. Ben Davis, operator, pointing out the following violations of hotel law:

Sect. 315.040, 315.090, 315.120, 315.180

"June 28, 1954 registered letter pointing out time work order due and the duty of Prosecuting Attorney.

"July 15, 1954 inspection and closing order issued.

"Mr. Ben Davis is a very cooperative man and wants to close the hotel, but he also wants the landlady to fix the building or release him from his lease. He has hired a good lawyer and the lawyer has advised him that if we got a circuit court order to close then he would have ground. The lawyer also stated that the circuit court closing order was the only legal closing order and that he didn't believe our order was legal.

"Since the Prosecuting Attorney has ruled as such, I think a review of our whole position in this matter should be 're-hashed.' Mr. Tatum stated another

James R. Amos, M.D.

example of this is in the liquor control section of the law which reads something like our section of the hotel law. Would you please review the law and state the course of action to be taken now?"

Section 315.020 RSMo 1949, to which you refer, reads as follows:

"It is hereby made the duty of the director of the division of health to inspect or cause to be inspected, at least once annually and as often thereafter as he may deem necessary, every hotel in the state, and for that purpose he shall have the right of entry and access thereto at any reasonable time. Whenever, upon such inspection, it shall be found that such business and property so inspected is not being conducted, or is not equipped in the manner and condition required by the provisions of sections 315.010 to 315.230, it shall thereupon be the duty of the director of the division of health to notify the owner, proprietor or agent in charge of such business, or the owner or agent of the building so occupied, of such changes or alterations as may be necessary to effect a complete compliance with the provisions of sections 315.010 to 315.230. It shall thereupon be the duty of such owner, proprietor or agent in charge of such business, or such owner or agent of the building so occupied to make such alterations or changes as may be necessary to put such building and premises in a condition that will fully comply with the provisions of sections 315.010 to 315.230; all permanent repairs and alterations to the building and premises to be made by the owner thereof; provided, however, that thirty days' time after receipt of such notice shall be allowed for conforming to the requirements of sections 315.010 to 315.230. If at the expiration of the required notice such owner or agent of the building so occupied refuse or fail to comply with said sections mentioned in such notice, then it shall be the duty of the director of the division of health to close said hotel until such requirements are complied with."

As you state in your letter, it is not to be supposed that the law contemplates that the duties of hotel inspection imposed upon the director of the division of health are to be discharged by him personally, and the underlined portion of Section 315.020, supra, makes provision for the actual inspection to be done by deputies.

James R. Amos, M.D.

The question which you have directed to us is whether these deputies may be district food and drug inspectors?

Section 192.090 RSMo 1949, states that the director of the division of health may delegate to a deputy, who may be the deputy food and drug inspector, responsibility for the administration of the laws pertaining to the inspection of hotels. That section reads:

"The division of health shall exercise such powers and duties pertaining to inspection of hotels, inns and boarding houses as is imposed by law, and such powers and duties may be delegated by the director of the division of health to a deputy who may be the deputy of food and drug administration and who, under the director, shall be chiefly responsible for the administration of laws, orders and findings relating to the inspection of hotels, inns and boarding houses."

It seems to us that the above section clearly gives the director of health power to delegate to the deputy of the food and drug administration power to administer all of the laws pertaining to the inspection of hotels, and that would, of course, include work orders and closing orders.

We believe, therefore, that work and closing orders may be issued only by the Director of the Division of Health, or by a deputy, who may be the deputy food and drug administration, if the Director of the Division of Health delegates such authority to such deputy.

CONCLUSION

It is the opinion of this department that the orders for alterations to be made in buildings used as hotels, to be given to the owner, proprietor or agent in charge of said building, when such building does not meet the requirements of a building used for a hotel by Missouri law, can only be given by the Director of the Division of Health or by a deputy who may be the deputy of food and drug administration, when such deputy is vested with such authority by the Director of the Division of Health.

It is our further opinion that the closing order for a hotel to be given, following non-compliance with the order for alterations in the building mentioned above, can only be given by the same person under the same conditions as noted above; that is to say, the Director of the Division of Health or by a deputy invested with such authority by the Director of the Division of Health.

James R. Amos, M.D.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

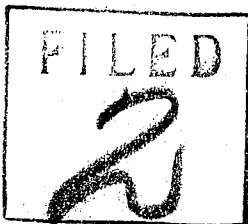
JOHN M. DALTON
Attorney General

HPW/ld

APPROPRIATIONS:
FEDERAL AID:
DIVISION OF HEALTH:

Federal aid provided under Public Law 725 as amended by Public Law 482 stands appropriated for current biennium to Division of Health.

December 1, 1954



James R. Amos, M.D., Director
Division of Health
Department of Public Health
and Welfare of Missouri
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"The Eighty-third Congress passed, and the President signed, Public Law 482 known as the Medical Facilities Survey and Construction Act of 1954. This Act amends Public Law 725, which was the basic Hill-Burton Hospital Construction Act.

"In order for Missouri to receive Federal Funds available under this Act, the General Assembly has, each biennium, written two appropriation acts making these funds available to the State Division of Health. In the Appropriation Laws of 1953-1955, as passed by the Sixty-seventh General Assembly, Section 6.140 and Section 6.150 made these appropriations. Each section states 'Federal Funds from the Federal Government made pursuant to Public Law 725, etc. . . .'

"We would like an opinion from your Office as to whether we can accept and disburse Federal Funds granted Missouri under the new Federal Law 482 and appropriated to the Division of Health under the above named sections. Inasmuch as the new law, Number 482, is a revision of the basic law #725, merely expanding the scope of the original Hill-Burton Program, it may be that no change in appropriating acts will be necessary.

James R. Amos, M.D., Director

"Funds are now available to Missouri for the added programs."

Sections 6.140 and 6.150, found as a part of House Bill 396 of the 67th General Assembly, now appear in Laws of Missouri 1953 at page 178. These two sections read as follows:

Section 6.140

"Federal funds from the federal government made pursuant to Public Law 725 for conducting and reporting survey of existing public and private hospitals and health centers.--All allotments, grants and contributions of funds which may be received by this state from the federal government for the period beginning July 1, 1953 and ending June 30, 1955, which is made pursuant to Public Law 725, known and cited as the Hospital Survey and Construction Act, for the purpose of conducting and reporting a survey of existing public and private hospitals and health centers and units and the need for the construction of public and nonprofit hospitals in this state, shall stand and are hereby appropriated for the use of the Division of Health."

Section 6.150

"Federal funds from the federal government made pursuant to Public Law 725 for the construction of public and nonprofit hospitals.--All allotments, grants, and contributions of funds which may be received by this state from the federal government, for the period beginning July 1, 1953 and ending June 30, 1955, which are made pursuant to Public Law 725, known and cited as the Hospital Survey and Construction Act, which provides for assistance by the federal government to states carrying on a hospital building program, for the purpose of paying any federal grants received by the state of Missouri for such purpose, for the construction of public and nonprofit hospitals in this state, shall stand and are hereby appropriated for the use of the Division of Health."

James R. Amos, M.D., Director

We have examined Public Law 482 passed by the 83rd Congress, and find that it is simply amendatory of Public Law 725 known as the "Hill-Burton Hospital Construction Act." The amendment serves to increase the scope of activities for which federal aid in the form of monetary grants has been made available to the several states meeting the requirements set forth therein.

In the construction of acts of the General Assembly, the guiding principle is the determination of the intent of the legislature in giving its approval to such acts. Examining the appropriation acts quoted supra covering the current biennium, it becomes readily apparent that the General Assembly intended thereby to make available to the State of Missouri, through the agency of the Division of Health, all of the benefits which might inure to the state through participation in the plans for surveys of existing health facilities and the construction of such facilities where needed. Further evidencing this intent is the fact that through the passage of what now appear as Sections 192.230, 192.240 and 192.250, RSMo 1949, the same division has been designated and empowered to conduct a survey of existing facilities and to provide plans for new facilities as well as to receive grants from all sources, including the federal government, for the purpose of effectuating such plans.

Comparing Public Laws 725 and 482, it will be observed that the aid provided therein is in the nature of a gratuity to the several states. Further, the basic underlying purposes of the two acts are the same, viz., the furtherance of the public health of the people of the nation. It has been determined that such aid should be distributed through such agencies of the various states as have been authorized by the people thereof speaking through the several General Assemblies.

It must also be remembered that all funds which are appropriated under the appropriation acts quoted supra are derived solely from the federal government. Any of such funds remaining unexpended are, under the terms of the federal act, required to be repaid into the federal treasury. We therefore are not confronted with the many technical objections which might be raised to the withdrawal of state moneys from the state treasury, inasmuch as the funds here under consideration are held by the State of Missouri for expenditure in a fiduciary capacity.

CONCLUSION

In the premises, we are of the opinion that the appropriations for the current biennium, found as Sections 6.140 and 6.150,

James R. Amos, M.D., Director

Laws of 1953, page 178, are sufficient to appropriate to the Division of Health all federal aid received by the State of Missouri under the provisions of Public Law 725 as amended by Public Law 482 of the 83rd Congress.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

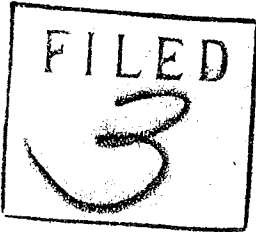
Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

COMPTROLLER AND
BUDGET DIRECTOR:

The contract for the purchase of a rug by the Missouri Supreme Court did not need to be approved by the state comptroller and budget director; that a contract for repairs to the Missouri Supreme Court Building should have been approved by the Director of Public Buildings.



February 3, 1954

Honorable Newton Atterbury
Comptroller and Budget Director
Department of Revenue
Jefferson City, Missouri

Dear Mr. Atterbury:

This department is in receipt of your letter dated November 24, 1953, in which you ask certain questions regarding the duties of your department.

"We received your letter of November 10, 1953, the first paragraph reading as follows:

"The purchasing agent's act specifically excludes the legislative and judicial branches, and I am enclosing copies of two opinions, one dated June 7, 1947, and one dated November 7, 1947."

"I believe that you mean by this that legislative and judicial branches are not required to go through the usual procedure as do other departments when (1st) an encumbrance is made against their accounts before obligations are incurred, (2d) in furnishing the comptroller with copies of contracts for certain purchases or contractual services and (3rd) in submitting payments to the comptroller with the understanding it is up to his office to decide if charges are properly made.

"Two specific deals brought this matter up. One was the purchase of rugs from the Jefferson Rug Company for \$2,859.36, the other was the paying of contractual work of the Western Waterproofing Company in the amount of \$11,432.50. We know the judicial and legislative branches operate on a basis different from that decreed for the other state departments. The above items have been processed by this department and paid, but the responsibility of the comptroller's office in connection with these payments is frankly not clear in our minds. We do not wish to ask either the judicial or legislative

Honorable Newton Atterbury

departments to comply with any rules that do not apply to them but at the same time we do not wish to neglect any duties which the law places on us. We are particularly concerned in Missouri Revised Statutes 1949, sections 8.070, 8.260, 8.250, 33.030 and 33.040, as to whether these sections apply to any extent to the judicial and legislative branches. The questions in our minds in regard to the two above mentioned transactions were (1) in the case of the rug should the obligation have been posted to our records as an encumbrance before the actual contract was made with the Jefferson Rug Company, and (2) should the comptroller's office decide as to the propriety of the charge made. For instance, as regards charge, had you bought a rug for the Attorney General's office, we would have insisted the price of \$2,859.36 be paid either out of your additions or replacements appropriation. The rug purchased from the Jefferson Rug Company was paid for by the Supreme Court out of their operations appropriation, but according to the wording of the appropriation, as well as the general understanding of the meaning of the term, operating expenses would not cover such a purchase. Similar questions arise in regard to the Western Waterproofing Company. If such a transaction had been made by another department, under the sections of the statutes above mentioned, we would have received before the contract was made from the Department of Public Buildings a copy of the contract, with a request for encumbrance. The amount of the contract, if proper, would have been charged against the account, as set forth under sections 33.030 and 33.040.

"As we before mentioned, we do feel the judicial and legislative branches are put on a different footing, but is the law which puts them on such status sufficient to relieve the comptroller's office of the duties required under sections 8.070, 8.260 and 8.250?

"Possibly your letter of November 10, 1953, was intended to answer all the above, but in thinking back on our discussion I am afraid I did not completely cover the matters that concerned us."

Honorable Newton Atterbury

In the above you direct our attention to Chapters 8 and 33, RSMo 1949, and to specific sections in each chapter. We shall consider first the parts of Chapter 8 to which you refer, which are Sections 8.070, 8.250, 8,260. This chapter relates to the jurisdiction of the Board and the Director of Public Buildings. Section 8.070, supra, reads as follows:

"The director shall serve as an advisor and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. No contracts shall be let for repair, rehabilitation, or construction of buildings, without approval of the director, and no claim for repair, construction or rehabilitation projects under contract shall be accepted for payment by the state without approval by the director; provided, that there is excepted herefrom the design, architectural services, construction, repair, alteration or rehabilitation of all laboratories, libraries, classrooms, technical buildings used for teaching purposes, and those buildings or utilities serving such educational units, and any building or teaching unit built wholly or in part from funds other than state appropriations."

Under the above section we believe that the state building inspector was a proper advisor in regard to the repairs made recently on the Supreme Court Building and that the contract for those repairs should not have been entered into without his approval. Obviously he would not have anything to do with the purchase of the rug referred to by you.

Section 8.250, supra, referred to by you, reads as follows:

"No contract shall be made by an officer of this state or any board or organization existing under the laws of this state or under the charter, laws or ordinances of any political subdivision thereof, having the expenditure of public funds or moneys provided by appropriation from this state in whole or in part, or raised in whole or in part by taxation under the laws of this state, or of any political subdivision thereof containing five hundred thousand inhabitants or over, for the erection or

Honorable Newton Atterbury

construction of any building, improvement, alteration or repair, the total cost of which shall exceed the sum of ten thousand dollars, until public bids therefor are requested or solicited by advertising for ten days in one paper in the county in which the work is located; and if the cost of the work contemplated shall exceed thirty-five thousand dollars, the same shall be advertised for ten days in the county paper of the county in which the work is located, and in addition thereto shall also be advertised for ten days in two daily papers of the state having not less than fifty thousand daily circulation; and in no case shall any contract be awarded when the amount appropriated for same is not sufficient to entirely complete the work ready for service. The number of such public bids shall not be restricted or curtailed, but shall be open to all persons complying with the terms upon which such bids are requested or solicited."

We believe that the provisions of the above section would apply to the contract with the Western Waterproofing Company, since that contract was for an amount in excess of \$10,000.

Section 8.260, supra, referred to by you, provides the manner of payment of appropriations of \$5,000 or more for the erection of buildings or for their repair. This section we believe to be applicable to the contract with the Western Waterproofing Company referred to above.

Let us now give attention to Chapter 33, RSMo 1949, and to Sections 33.030 and 33.040, thereof. Those two sections read:

"Section 33.030--The division of the budget and comptroller shall have the power and its duties shall be:

"(1) To assist the director of revenue in preparing estimates and information concerning receipts and expenditures of all state agencies as required by the governor and general assembly;

"(2) To certify approval of the incurring of all obligations for the payment of money. As a prerequisite to such certification, the comptroller shall ascertain that the obligation to be incurred is within the work program and budget allotment. Each such certification from the comptroller to the state auditor shall be accompanied by a copy of the purchase order.

"(3) To preapprove all claims and accounts and

Honorable Newton Atterbury

certify them to the state auditor for payment. As a prerequisite to his preapproval of claims and accounts, the comptroller shall ascertain that such claims and accounts are regular and correct. Each such certification from the comptroller to the state auditor shall be accompanied by a copy of the invoice.

"(4) To prepare and report to the governor or to the general assembly when requested any financial data or statistics which he or it may require, such as monthly or quarterly estimates of the state's income and cost figures on the current operations of departments, institutions or agencies."

"Section 33.040. 1. No expenditure shall be made and no obligation incurred by any department without the following certifications:

"(1) Certification by the comptroller pursuant to the provisions of section 33.030;

"(2) Certification by the auditor that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it.

"2. At the time of issuance each such certification shall be entered on the general accounting books by the comptroller as an encumbrance on the appropriation and on the allotment; provided, that if the obligation shall not be incurred after such certification shall have been entered on the general accounting books as an encumbrance on the appropriation and on the allotment, such certification shall be removed from the general accounting books as an encumbrance on the appropriation and on the allotment. Any officer or employee of the state who shall make any expenditure or incur any obligation without first securing such certifications from the comptroller and the auditor shall be personally liable and liable on his bond for the amount of such expenditure or obligation. To prevent inconvenience and delay, the comptroller and the auditor shall be authorized to establish a system for certification of emergency or anticipated minor obligations and expenditures, and non-budgetary expenditures."

Honorable Newton Atterbury

We now call attention to the fact that Section 34.010, RSMo 1949, states that: "The term 'department' as used in this chapter shall be deemed to mean department, office, board or commission, bureau, institution, or any other agency of the state except the legislative and judicial departments." While Section 34.010, supra, refers to "as used in this chapter" such section is found as Section 73, Laws Mo. 1945, page 1428, and there the phrase is found to be "as used in this Act." The Act therein referred to contains what are now Sections 33.030 and 33.040. We believe, therefore, that the term "department" as used in Section 34.010, supra, has reference to the provisions of Sections 33.030 and 33.040, supra. Section 33.030 is found in Laws Mo. 1945, page 1428, Section 36. Section 33.040, is found in Laws Mo. 1945, page 1428, Section 60. It is to be noted that Section 33.040 referring to the certification by the comptroller pursuant to the provisions of Section 33.030 refers to "any department". Therefore, we do not believe that Sections 33.030 and 33.040 apply to the judicial branch of the government. In view of this, we believe (1) that in the case of the rug the obligation did not have to be posted on your records as an encumbrance, and (2) that approval by the office of the comptroller before contract of purchase was made was not necessary.

CONCLUSION

It is the opinion of this department that the contract for the purchase of a rug by the Missouri Supreme Court did not need to be approved by the state comptroller and budget director; that a contract for repairs to the Missouri Supreme Court building should have been approved by the Director of Public Buildings.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

APPROPRIATIONS: Members of State Board of Nursing entitled
STATE BOARD OF NURSING: to compensation of ten dollars per day on
and after date of appointment October 27,
1953, 95 per cent of appropriations under House Bill 384, Section
7.390, passed by the 67th General Assembly as of August 29, 1953,
shall be transferred to the State Board of Nursing Fund for the
use of the State Board of Nursing and expenses of said Board shall
be paid out of such appropriation and that appropriated under House
Bill 11, passed by the Second Session, 67th General Assembly.



June 3, 1954

Honorable Newton Atterbury
State Comptroller
Jefferson City, Missouri

Dear Mr. Atterbury:

This will acknowledge receipt of your request for an opinion,
which for the sake of brevity, we shall restate.

You first inquire when the rate of compensation of members
of the State Board of Nursing changes from eight dollars to ten
dollars per day.

Prior to the enactment of Senate Bill 165, passed by the
67th General Assembly, known as Chapter 335 Missouri Revised
Statutes Cum. Supp. 1953, Section 335.170 RSMo 1949 fixed the
compensation of the members of said Board at eight dollars per
day for each day or a part thereof for attending meetings or
while engaged in otherwise discharging their duties. However,
this section was repealed by Senate Bill 165, supra, and now
under Section 335.150 Missouri Revised Statutes Cum. Supp. 1953,
each member of said board shall receive ten dollars per day for
each day she is engaged in the discharge of her duties.

The question now is, when did Section 335.150 supra, become
effective? All bills passed by that particular session of the
67th General Assembly except appropriation acts and those carrying
emergency clauses became effective under Section 29, Article III,
Constitution of Missouri, 90 days after adjournment. The General
Assembly adjourned that particular session on May 31, 1953. In
view of the above and foregoing, Section 335.150 supra, providing
for compensation of such members for ten dollars per day became
effective on August 29, 1953.

Senate Bill 165 became effective August 29, 1953. Said
bill repealed Chapter 335 Revised Statutes of Missouri 1949,

Honorable Newton Atterbury

which created a Board of Examiners and Registrars of Nurses and amongst other things provided compensation for the members of said board. In your request you state that the Governor appointed members to the new State Board of Nursing on October 27, 1953. Therefore, during the interim, the effective date of Senate Bill 165 supra, August 29, 1953, and date of appointment of members of the new State Board of Nursing, October 27, 1953, there was in fact no board under either the old or the new law. Had Chapter 335 Revised Statutes of Missouri 1949 not been outright repealed by Senate Bill 165 supra, then the members of the old board would carry over until their successors were duly appointed and qualified as provided by statute and the Constitution of Missouri. So, strictly speaking, the rate of compensation changed from eight dollars per day to ten dollars per day on October 27, 1953, when the members of the new State Board of Nursing were duly appointed by the Governor.

Therefore, it is the opinion of this department that members of the State Board of Nursing are entitled to receive ten dollars per day compensation on and after October 27, 1953, the date of their appointment.

You next inquire if it will be legal for you to transfer 95 per cent of the balance of the appropriations provided in House Bill 384, Section 7.390, passed by the 67th General Assembly, to the State Board of Nursing fund and then to pay expenses of the present State Board of Nursing from the amount transferred and that appropriated under House Bill 11, passed by the 67th General Assembly, Second Extra Session, which was in the amount of \$11,700.00.

House Bill 384, Section 7.390, passed by the 67th General Assembly, which convened in Jefferson City on January 7, 1953, appropriates \$56,000.00 out of the state treasury chargeable to the State Board of Nurses Examiners Fund for use of the State Board of Nurses Examiners for the biennial July 1, 1953, to June 30, 1955. (Said appropriation act was approved July 14, 1953.)

House Bill 11, passed by the 67th General Assembly, Second Extra Session, is an appropriation out of state treasury chargeable to the State Board of Nursing Fund in the sum of \$11,700.00 for use of the State Board of Nursing for a period from the effective date of said appropriation act and ending July 30, 1955, and said appropriation act concludes with the following paragraph:

Honorable Newton Atterbury

"The foregoing amounts are in addition to the amounts appropriated for the same purposes for the 1953-55 biennial period in Section 7.390 of House Bill No. 384 of the Sixty-seventh General Assembly, approved July 14, 1953."

Senate Bill 165, Chapter 335, Missouri Revised Statutes Cum. Supp. 1953, was approved by the Governor on April 1, 1953. So, we can assume, under established rules of statutory construction, that the 67th General Assembly of the State of Missouri, in passing the foregoing appropriation acts were also apprised of the fact that Senate Bill 165 had been enacted, since the 67th General Assembly passed both the appropriation acts referred to and Senate Bill 165 supra. *Smith v. Pettis County*, 136 S.W. (2d) 282, 345 Mo. 839; *Sikes v. St. Louis & S.F.R. Co.*, 105 S.W. 700, 127 Mo. App. 326; *Timmonds v. Kennish*, 149 S.W. 652, 244 Mo. 318. We merely mention this fact in an effort to try to determine what the legislative intent was with regard to these particular appropriation acts.

Strictly speaking, there was not, in Chapter 335, RSMo 1949, or the act repealing that Chapter and creating the new nursing law, any such board as the "State Board of Nurses Examiners" or "State Board of Nurses Examiners Fund," which were referred to as such in the appropriation act, House Bill 384, Section 7.390 supra.

Section 335.120, RSMo 1949, created a "Board of Examiners and Registrars of Nurses," and Section 335.080 RSMo 1949, provided for the deposit of fees and money received by said Board in the state treasury to the credit of "Board of Nurses Fund." Section 335.130, Missouri Revised Statutes Cum. Supp. 1953 created what is known as a "State Board of Nursing," and Section 335.180 Missouri Revised Statutes Cum. Supp. 1953 provides that all funds received by the above Board shall be paid to the director of revenue and placed to the credit of the "State Board of Nursing Fund." Section 335.180 Missouri Revised Statutes Cum. Supp. 1953 provides that on the effective date of said chapter, not over 95 per cent of all funds held in the name of the State Board of Nurses Examiners shall be transferred to the Board created by this chapter, (which is State Board of Nursing). Furthermore, it is our understanding that expenses of the present and past board have been paid out of the appropriations contained in House Bill 384, Section 7.390 supra. So, we believe it was clearly the legislative intent that the appropriations of House Bill 384, Section 7.390 supra, was for the credit of

Honorable Newton Atterbury

the State Board of Nursing Fund for the use of the State Board of Nursing.

This is further supported by the fact that the same General Assembly, in passing House Bill 11 supra, which was a later appropriation act and which was specifically chargeable to the State Board of Nursing Fund for use of the State Board of Nursing, contained in the last paragraph of said appropriation act, a provision that such appropriation was in addition to amounts appropriated for the same purposes for biennial period 1953-55 in House Bill 384 of the 67th General Assembly. Also that all such fees received by either the former Nursing Board or the latter Board, successor in office, were all to be used for one purpose, that of expenses of the Nursing Board of the State of Missouri. Furthermore, this is supported by the fact that the administrators of said act and the executive department of the State of Missouri have construed the law by their actions, in paying expenses of both Boards out of the appropriations provided under House Bill 384, Section 7.390 supra. Robertson v. Manufacturing Lumberman's Underwriters, 145 S.W. (2d) 134, 346 Mo. 1103; Williams v. Williams, 30 S.W. (2d) 69, 325 Mo. 963.

CONCLUSION

It is the opinion of this department that in fact the rate of compensation for board members changed from eight dollars to ten dollars per day on and after August 29, 1953, the effective date of Senate Bill 165, passed by the 67th General Assembly, State of Missouri; however, since said bill repealed the former law, Chapter 335 Revised Statutes of Missouri 1949, creating the State Board of Examiners and Registrars of Nurses and fixing the compensation of said members, there being no board in existence during the interim, August 29, 1953, and date of appointment of members of the new State Board of Nursing by the Governor on October 27, 1953, that the compensation of ten dollars per day provided under Senate Bill 165 supra, for board members in fact was effective on and after October 27, 1953. It is the further opinion that 95 per cent of the balance of the appropriations in House Bill 384, Section 7.390, as of August 29, 1953, effective date of Senate Bill 165, passed by the 67th General Assembly, should be transferred to the State Board of Nursing Fund and expenses of the present State Board of Nursing may be paid out of such funds and those provided under House Bill 11, passed by the 67th General Assembly, Second Extra Session.

Honorable Newton Atterbury

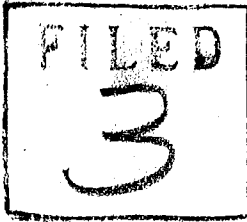
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

ARH:am

COMPTROLLER AND BUDGET DIRECTOR:



The provisions of Article IV, Section 28, Constitution of Missouri, 1945, are applicable to the judiciary; and on each claim submitted for payment the Comptroller must certify it for payment and the Auditor must certify that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it.

July 1, 1954

Honorable Newton Atterbury
Comptroller and Budget Director
Capitol Building
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"We received your letter of February 3, 1954, giving us an opinion in regard to certification for payment by the Comptroller to cover various obligations incurred by the Supreme Court.

"We interpreted your conclusion and the four lines immediately preceding that conclusion to mean that:

- " (1) It was not necessary for the Supreme Court to purchase any items with the exception of paper, printing, and binding (about which you had previously ruled) through the State Purchasing Agent. That it was not the Comptroller's duty to preapprove and encumber any purchases, with the exception as above mentioned, before they were made and a State obligation incurred.
- " (2) That repairs or additions to the Missouri Supreme Court Building should be done on contract which was approved by the Director

Honorable Newton Atterbury

of Public Buildings prior to the start of the work and which are encumbered by the Comptroller at the time the approved contract is received.

"We were also interested in knowing if it was not a duty of the Comptroller's Office, as well as the Auditor's Office, as part of the condition of certifying for payment, that the payment itself be made out of the proper account. If our understanding is correct, it is the duty of the Comptroller's Office, as well as the State Auditor's Office to certify to the State Treasurer that the expenditure is within the purpose of the appropriation; that is, items that are in the wording of the appropriation itself and considered from the accounting standpoint that are clearly to be paid out of 'operation' or 'general expense' appropriation could not be paid out of 'additions, repairs, replacement' appropriation and vice versa. We believe the State Auditor agrees with this office in our opinion that it is the duty of both offices to see that payments are charged to the proper appropriation.

"The primary concern of this department and the Auditor's Office is what conditions must be satisfied before we draw and sign a warrant authorizing the State Treasurer to withdraw and pay from the treasury. In your opinion of February 3, 1954, we note that you made no reference to Article 4, Section 28, of the Constitution of Missouri, which reads as follows:

"Section 28. Withdrawals from treasury - limitations on authority to incur obligations - certifications by comptroller and auditor - expiration of appropriations. No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of

Honorable Newton Atterbury

the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made.'

"We note Article 4, Section 28 makes no reference to departments and would seem to us to cover all payments made by the State without regard to origin. Your opinion of February 3, 1954, had satisfied us insofar as our problem with the Supreme Court was concerned but we now have a letter of February 8, 1954, from Mr. John M. Holmes, Executive Secretary of the Judicial Conference of Missouri, bringing up additional questions based on his interpretation of your opinion. His letter reads as follows:

"Supplementing my letters of January 12, 20, 25 and 27, 1954, I have read the opinion of the Attorney General to Honorable Newton Atterbury, dated February 3, 1954, holding that Secs. 33.030 and 33.040 RSMo 1949 do not apply to the judicial branch of the government, which would include the Judicial Conference of Missouri. I would still like to have a conference with you and Mr. Atterbury at your earliest convenience, covering not only the matters raised in previous letters but the broader question of what jurisdiction remains. Here are a few of the questions that I have in mind:

- "1. Do we continue to send requisitions to your office for Personal Service, Operation, Additions, Repairs and Replacements, respectively, or do we make our requests direct to the State Treasurer for drafts covering payment of salaries and other expenditures?

Honorable Newton Atterbury

"2. Do the technicalities pertaining to the purchase of paper still apply?

"3. How are purchases involving printing and the charges and payments therefor to be handled?

"Other matters will probably occur to each of us before we have the conference."

"Mr. Holmes' interpretation of your opinion is so radically different from our understanding that we would sincerely appreciate it if you would add to your conclusion of February 3, an additional paragraph or so which would satisfactorily answer the three questions that Mr. Holmes has in mind, and further clarify, giving consideration to Article 4, Section 28, of the Constitution quoted above, the Comptroller's and Auditor's duties in certifying payments for the judicial branch."

Your request may be resolved into two questions:

(1) whether Article IV, Section 28, Constitution of Missouri, 1945, is applicable to the judicial branch of the state government, and (2) who is the final arbiter over disputes in classification of claims under the appropriations specified by the Legislature.

The Constitution of Missouri, 1945, by Article IV, Section 23, requires the Legislature to distinctly specify the amount and purpose of appropriations as follows:

"The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year. The general assembly shall make appropriations for one or two fiscal years, and the 63rd General Assembly shall also make appropriations for the six months ending June 30, 1945. Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

(Emphasis ours)

Honorable Newton Atterbury

Article IV, Section 28, Constitution of Missouri, 1945, requires the comptroller to perform certain duties before any claim against the state is paid.

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

The separation of the state government into three branches is provided by Article II, Constitution of Missouri, 1945:

"The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers, properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

Although there is provision for separation of the government into three branches, i.e., the executive, legislative and judicial, these three branches do not exist in a vacuum, but they are integrated into a complete scheme of state government.

Honorable Newton Atterbury

The Legislature is the traditional keeper of the purse, and is given by the Constitution the power to appropriate money, and to specify the purposes for which such money may be expended. The Constitution contemplates the control of the expenditure of the money appropriated by the Legislature to be vested in the executive branch of government, and provides for a comptroller who will examine each claim and give his certification as to its validity. The Constitution further provides for an auditor, and requires that he determine the existence of a proper appropriation.

The Constitution having given to the Comptroller the duty of ascertaining the validity of an appropriation, and given to the Auditor the duty of certifying that the expenditure is within the purpose of the appropriation, we must conclude that those officers must perform said duties on all claims presented, and that their determination should be the final one subject only to review by the Courts. To hold otherwise and state that the legislature and judiciary could determine whether each claim submitted was within a certain appropriation would nullify the effect of this constitutional provision.

CONCLUSION

It is, therefore, the opinion of this office that the provisions of Article IV, Section 28, Constitution of Missouri, 1945, are applicable to the judiciary; and that on each claim submitted for payment the Comptroller must certify it for payment and the Auditor must certify that the expenditures is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

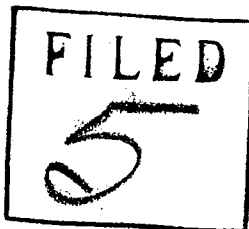
Very truly yours,

JOHN M. DALTON
Attorney General

FMG:lvd

MUNICIPAL WATER SUPPLY:
Use of fluoride:

The addition of fluoride to a city's water supply to make the fluoride content one part fluoride to one million parts water as recommended by the Division of Health of Missouri and the United States Public Health Service would not contravene any existing law of the State of Missouri.



July 14, 1954

Honorable Harold W. Barrick
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Mr. Barrick:

This will be the opinion you requested from this office whether the addition of a given content of fluoride to a city's water supply, according to a standard fixed by the Missouri State Board of Health and the United States Public Health Service would contravene any existing law of Missouri. Your letter requesting the opinion states:

"I herewith request an opinion from your office on the following question:

"Would the addition of sufficient fluoride to a city's water supply to bring the fluoride content to the standard one part per million, as prescribed by the Missouri State Board of Health and the United States Public Health Service, contravene any existing law of the State of Missouri?"

"Thank you very much for your help in this matter."

Review of the Revised Statutes and Session Acts of Missouri discloses that there is no legislative enactment in force in this State either permitting or prohibiting the fluoridation of water.

Honorable Harold W. Barrick:

Section 192.180, V.A.M.S. 1949, provides that the Division of Health may make rules to insure a safe quality of water furnished by municipalities and others dispensing water to the public. The text of said Section 192.180 reads as follows:

"The division of health shall make and enforce adequate rules and regulations for the maintenance of a safe quality of water dispensed to the public and for the collection of samples and analysis of water, either natural or treated, furnished by municipalities, corporations, companies, or individuals to the public and shall fix the fees for any service rendered under the rules and regulations to cover the cost of the service."

Section 192.200 of the same revision of the statutes, requiring any municipality or other corporation, or company, or individual supplying water to the public (not exempted by the terms of the sections referred to in Section 192.220, V.A.M.S. 1949) to keep the division advised of its complete plan and facilities for furnishing water to the public, reads as follows:

"Every municipal corporation, private corporation, company or individual supplying or authorized to supply water to the public within the state shall file with the division of health a certified copy of the plans and surveys of the water works with a description of the methods of purification and of the source from which the supply of water is derived, and no source of supply shall be used without a written permit of approval from the division of health, and no new supplies shall be established or dispensed to the public without first obtaining such written permit of approval. Whenever an investigation of any water supply, plant, or methods used shall be undertaken by the division of health, it shall be the duty of the municipality, corporation, company, institution or person having in charge the water supply under investigation to furnish on demand to the division of health such information

Honorable Harold W. Barrick:

as that body considers necessary to determine the sanitary quality of the water being dispensed. Approval of new water supplies for municipalities must necessarily involve consideration of sewage provisions for safety to the public health."

It is provided by the statutes of this State that cities, towns and villages may, through boards of health or departments of health, or other agencies, as the case may be, by regulations or ordinances, prescribe the means of insuring a safe quality of water to be dispensed by such municipalities to the public.

The duties imposed by statute upon the Division of Health, respecting the establishment and maintenance of a safe quality of water dispensed to the public, are to promulgate and enforce such rules, and to analyze samples of the water supply to determine if the quality of the water supply is safe, and to issue the certificate, required by said Section 192.200, supra, concerning the plans and surveys of the water works, with a description of the methods of purification and the source from which the supply of water is derived, and to approve, by written permit, the dispensing of such water supply to the public.

Our research in the preparation of this opinion, including conferences with personnel of the Division of Health of this State, and also including correspondence with that Division and the Regional Office of the United States Public Health Service, discloses that neither the Division of Health of Missouri nor the United States Public Health Service have or maintain any fixed standard of content of fluoride added to a city's water supply to be followed by municipalities or other entities supplying water to the public. These units of public health do advise and recommend a content of fluoride to be added to public water supplies which must be approved by the Division of Health of this State, but they do not fix or establish a definite standard of content of fluoride for use in water to be dispensed to the public.

It appears that municipalities or other entities, in complying with the statutes requiring that a safe quality of water shall be dispensed to the public, may determine for themselves, individually, the amount of fluoride to be added to such cities' water supplies to bring such fluoride content to a standard that will meet

Honorable Harold W. Barrick:

with the approval of the Division of Health of Missouri and the United States Public Health Service. That standard is said, in your letter requesting an opinion, to be one part per million.

Statutory provisions providing for insuring a safe quality of water to be dispensed to the public and the duties imposed upon the Division of Health of this State incident to requiring a safe quality for public use, however, primarily have no relationship to the addition of fluoride to a water supply to be so dispensed, insofar as the use or fixing the content of fluoride as an additive to such water supply is concerned. The addition of fluoride to a water supply, as we are advised by both the Division of Health of this State and the Regional Office of the United States Department of Health, Education and Welfare Public Health Service, is designed and applied as a means of providing dental hygiene and for the control and prevention of dental caries, a dental disease said by the Division of Health to be very prevalent in Missouri.

We are advised by the Regional Office of the United States Public Health Service in a recent communication from that office to the Director of the Division of Health of Missouri that mean temperatures, humidity and general weather conditions vary sufficiently within the continental limits of the United States to have a definite bearing upon the fluoride concentration as an additive to municipal water supplies. That communication states:

"* * * It is, therefore, impossible to make any general statement as to the optimum fluoride content to which each water supply should be fluoridated.
* * *"

The same communication, reciting the facts and result of the study of the treatment of dental caries, and in giving the opinion of that office as to the content of fluoride to be used in water supplies in the State of Missouri, further states:

"From a dental caries experience study in nine selected cities of Missouri, in which over 3,206 children were examined, high dental caries experience rates were found associated with the use of domestic

Honorable Harold W. Barrick:

waters low in fluoride (0.2 p.p.m.); low dental caries experience rates were found associated with the use of water supplies having an optimum fluoride content of 1.1 p.p.m. On the basis of evidence found in this extensive and well-planned study it is my belief that fluoridation to the extent of 1.0 p.p.m. is an ideal for the State of Missouri."

The recent written communication to this office from the Division of Health of Missouri, respecting the content of fluoride to be added to public water supplies, expressing the policy of that Division, states the following:

"In reply to your request concerning the dilution of fluoride recommended by the Division of Health in the fluoridation of public waters, we recommend that the amount of fluoride be controlled at 1 part fluoride per million parts of water."

It will, therefore, appear plain, we believe, that there is no standard of content of fluoride added to a municipal water supply fixed by the Division of Health of Missouri or the United States Public Health Service. The amount of fluoride used in the fluoridation of a municipal water supply rests with the municipalities themselves. The Division of Health of Missouri and the United States Public Health Service only make suggestions and recommendations as to the content of fluoride in municipal water supplies.

CONCLUSION

Considering the premises, it is the opinion of this office that since there is no standard of content of fluoride fixed by the Division of Health of Missouri or the United States Public Health Service or by the statutes of this State where fluoride is added to a municipal water supply to be dispensed to the public, it would contravene no existing law of the State of Missouri for municipalities to add to water supplies one part fluoride to one million parts of water, as suggested and recommended by the Division of Health of Missouri.

Honorable Harold W. Barrick:

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

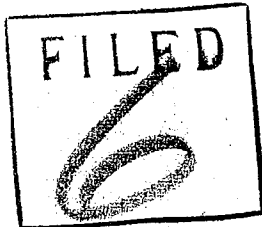
Very truly yours,

JOHN M. DALTON
Attorney General

GWC:irk

COUNTY COMMITTEES:
VACANCIES:
PRIMARY ELECTIONS:

Vacancy created in a county committee by a tie vote is filled by a majority of the new county committee electing a qualified person to fill such vacancy.



September 3, 1954

Honorable Wm. T. Bellamy, Jr.
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

This will acknowledge receipt of your letter of August 9, 1954, requesting an opinion of this office on the following question:

"In the recent primary election held August 3, 1954, two candidates for Republican committeeman for Salt Fork Township of this county tied, each receiving seven votes, and two candidates for Democratic committeewoman of the same township (one of whom was a write-in candidate) tied with 51 votes each. I have had propounded to me the question as to whether the old county committee, that is, the committee which served prior to the election of August 3rd, or the county committee election on August 3rd, is the proper committee to fill these vacancies existing because of the aforementioned tie vote. * * *"

Section 120.783 RSMo Cum. Sup. 1953 provides as follows:

"120.783. Where candidates tie, vacancy on committee exists.--When two or more candidates for election as a party committeeman or committeewoman receive an equal number of votes and a higher number than any other candidate, a vacancy shall

Honorable Wm. T. Bellamy, Jr.

be deemed to exist on the party central committee, and shall be filled by the committee in the same manner as other vacancies are filled."

And Section 120.787 RSMo Cum. Sup. 1953 provides:

"120.787. Vacancies on county committee, filled, how.--Whenever any vacancy shall occur on the county central committee of any political party, a majority of the committee shall have power to fill such vacancy by electing any qualified voter of such political party who resides in the township or voting district to be represented."

In the above two sections, it appears that a tie vote for committeeman or committeewoman creates a vacancy in the party central committee and that such vacancy is to be filled by the majority of the committee electing a qualified person therefor. Your problem seems to be whether the old committee, in existence before the primary election, or the new committee elected at such primary election is the proper body to fill this vacancy. It seems clear that the new committee, elected at the primary election, which in this case was held on August 3, 1954, is the proper body to fill this vacancy. No vacancy exists in the old committee and it appears from the statutes that it is contemplated that it is the majority of the committee upon which there is a vacancy that shall exercise the function of filling such vacancy.

Section 120.750 RSMo 1949 provides in part:

"That for the purpose of making nominations to fill vacancies resulting from death or resignation and not otherwise, on a ticket previously nominated a majority of all the members-elect of a central committee shall be necessary to take action."

Since this refers to vacancies on a ticket, it does not govern the question here involved. Likewise, the vacancy here involved was not created by death or resignation, and the statute specifically provides that that was the only situation which it covers.

CONCLUSION

From the foregoing, it is the conclusion of this office that in answer to your question, it will be the duty of the majority

Honorable Wm. T. Bellamy, Jr.

of the county committee elected at the primary held on August 3, 1954, to fill by election the two vacancies created by the tie vote in the race for Democratic committeewoman and Republican committeeman.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Very truly yours,

JOHN M. DALTON
Attorney General

FLH:sm

MOTOR VEHICLES:
LICENSES:
MISDEMEANORS:
CRIMINAL LAW:
PENALTIES:



(The operation of a commercial vehicle with
(load in excess of maximum weight of license
(is subject to penalties provided by Section
(301.440, RSMo 1949. Operation of vehicle
(licensed as local commercial vehicle outside
(local commercial zone is subject to penalties
(provided by Section 301.440, supra. Operation
(of vehicle on which license has expired is
(also subject to punishment in accordance with
(the provisions of the above mentioned section.

January 22, 1954

Hon. Max B. Benne
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Mr. Benne:

You have requested an opinion of this office as follows:

"I have three questions similar in nature that concern and pertain to the Laws of motor vehicles under Chapter 301 of the Revised Statutes of Missouri. They center around the question as to whether or not certain courses of conduct are set out in the statutes in a manner sufficiently clear so as to inform a person with no uncertainty as to whether or not he is violating the law. Section 301.440 R. S. Mo., provides a punishment for all the provisions of that chapter for which no specific punishment is provided. Section 301.060 provides for an annual registration fee for all vehicles, according to the classifications listed. However, nowhere can I find any express language stating that it shall be illegal to operate a commercial vehicle with a total load in excess of the maximum amount for which it may be registered (assuming compliance with Section 304.180), to operate a "locally licensed" commercial vehicle outside the prescribed area, or to operate an ordinary passenger car upon a validly issued but expired Missouri license.

Hon. Max B. Benne

"My specific questions are as follows:

"1. Can a person be prosecuted under Chapter 301 or 304 for operating a commercial vehicle with a total load in excess of the maximum weight limit of the class in which he is registered? If so would the offense be for the excess weight, or for the failure to pay a proper fee for the registration?

"2. Under what section of Chapter 301, if any, could a prosecution be based for the operation of a vehicle, licensed as a Local Commercial Vehicle, outside the 25 mile radius defined in Section 301.010 (10)?

"3. Under what section of the statutes, if any, could a prosecution be based for the continued use of a validly issued license on a non commercial vehicle after it had expired? Note that there is a specific penalty for late registration under Section 301.050.

* * * * *

"I would appreciate any ideas or opinions which you can offer to enlighten me on the above matters."

Your first question concerns the penalty for the operation of a commercial motor vehicle with a load on the vehicle in excess of the limit for which the vehicle was licensed but not above the maximum load permitted by Section 304.180, RSMo 1949.

The above mentioned section is now contained in Laws 1951, page 704.

The provision for the registration of commercial motor vehicles in accordance with their weight is now contained in Section 301.060, found in Laws 1951, pages 699-700.

It will be noted that both of the above sections were repealed as they appeared in Laws of 1949 and other sections in their place enacted in 1951. Section 304.240, RSMo 1949 was also repealed in 1951 by House Bill 325 and the law enacted

Hon. Max B. Benne

in its stead appears in Laws 1951, pages 706-707. This last mentioned section makes the violation of any of the provisions of Sections 304.170 to 304.240 misdemeanors and provides penalties. By its own limitations this section cannot be considered as applying to any other sections than contained within those enumerated by it.

In regard to the penalty for operating a motor vehicle with weight in excess of that permitted by the annual registration fee paid, since there is no penalty provided in the section prescribing the fees to be paid for the weight carried, we must look to Section 301.440, RSMo 1949, to find a penalty provided.

Section 301.440 is as follows:

"Any person who violates any provisions of this chapter for which no specific punishment is provided, shall upon conviction thereof be punished by a fine of not less than five dollars or more than five hundred dollars or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

This above section is provided for violations of the registration regulations, as it reads, "any provision of this chapter for which no specific punishment is provided." The violation would be operating an improperly licensed vehicle.

In answer to your second question operating a vehicle licensed as a local commercial vehicle beyond the twenty-five mile radius is also an offense punishable under the provisions of Section 301.440, supra.

Section 301.020, RSMo 1949 provides in part as follows:

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, except as herein otherwise expressly provided, shall file, by mail or otherwise, in the office of the director of revenue, an application for registration on a blank to be furnished by the director of revenue for that purpose, containing:

* * * * *

* * * * *

"(3) If said motor vehicle be a commercial

Hon. Max B. Benne

vehicle the weight of the vehicle and the
desired load in pounds; * * * * *

The Section 301.060 provides for the fees to be paid and makes the fee commensurate with the purpose for which the vehicle is to be used and the weight and purpose for commercial motor vehicles.

Quoting briefly from the last mentioned section we find the following Section 301.060 the annual registration shall be as follows:

"Annual registration fees. -- The annual
registration fee shall be as follows:
* * * * *

There are separate sections for local commercial vehicles and for commercial motor vehicles. This is a licensed fee law. The law requiring a license on a motor vehicle is Section 301.020 quoted above in answer to your first question. The law requires a vehicle operating upon the highways of this State to be licensed and Subsection 5 of Section 301.130, RSMo 1949 provides as quoted in relevant portions as follows:

"5. Before being operated on any highway of this state every motor vehicle or trailer shall have displayed the license plates or temporary permit issued by the director entirely unobscured, unobstructed, all parts thereof plainly visible and kept reasonably clean and so fastened as not to swing. * * *"

It will be noted that no specific punishment is provided for the violation of Section 301.060. That section simply designates the license to be used for the specific purpose and sets out the charge. It naturally follows that the use of a vehicle for a purpose or with a weight for which it has not been licensed is a violation of law punishable as provided in Section 301.440, supra.

In answer to your third question the opinion of this office to J. Hal Moore, dated September 20, 1951 is attached. This opinion states that a person operating a motor vehicle after the license has expired is subject to fine or imprisonment, and the \$2.00 late registration fee must be paid in order to register the vehicle after the license has expired.

Hon. Max B. Benne

CONCLUSION

It is therefore the opinion of this office that prosecution for operating a commercial vehicle with load in excess of the maximum weight for which the vehicle is registered should be for violation of the provisions of Chapter 301, RSMo 1949, as amended and the penalty is prescribed in Section 301.440, RSMo 1949.

It is further the opinion of this office that the operation of a vehicle licensed as a local commercial vehicle outside the twenty-five mile radius as defined in Section 301.010, Laws of Missouri, 1951, page 679, is a violation of the provisions of Chapter 301, and for which punishment is provided by Section 301.440, RSMo 1949.

It is further the opinion of this department that when a person operates a motor vehicle on the highways of this State a motor vehicle or trailer for which the license has expired, may be punished in accordance with Section 301.440, RSMo 1949.

The foregoing opinion which I hereby approve was written by my Assistant, James W. Faris.

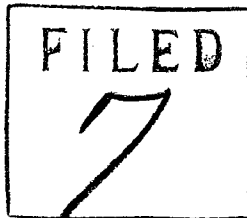
Yours very truly

JOHN M. DALTON
ATTORNEY GENERAL

JWF:A

CONDEMNATION:
COUNTY:
EMINENT DOMAIN:
STATE HIGHWAY COMMISSION:

In the absence of agreement between the parties to a condemnation suit to the contrary, fixtures, attached to the land condemned, pass to the condemner. And, if the condemner wishes such fixtures removed, it must bear the expense of removal of said fixtures.



February 15, 1954

Honorable Max B. Benne
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Sir:

By letter of December 19, 1953, you requested an official opinion, reading in part, as follows:

"**** When a utility pole line is located on private right-of-way, inside the fence line, along county roads or state highways, and a road-widening program requires the moving of such line, should the county or state, as the case may be, be required to bear the expense of moving such pole line? * * *"

Your question is fully answered by the Supreme Court of Missouri in State ex rel. v. Haid, 332 Mo. 686, 59 S.W. (2d) 1057, quashing a writ of certiorari brought by the State Highway Commission against the Judges of the St. Louis Court of Appeals, to quash an opinion of that court in the case of State ex rel. State Highway Commission vs. Caruthers et al., 51 S.W. (2d) 126. The State Highway Commission had brought suit to condemn a right of way through defendant's land for Highway No. 61. A house, barn, and fences, were on part of the condemned land. The owner of the condemned land had moved those fixtures at his own expense. The trial court instructed as to damages, in part, as follows at 59 S.W. (2d), l.c. 1058:

Honorable Max B. Benne

" * * * and to this amount, if any, you should add the reasonable and necessary costs to the exceptors in moving the house and barn and the side fences in question off of the right of way condemned."

The Supreme Court declared this instruction good, if there were evidence on which to base it, i.e., if there were an agreement that the fixtures should be moved at the expense of the owner of the condemned land, saying l.c. 1059:

" * * * In the case at bar, the house, barn, and fences, being fixtures to the land condemned, would pass to the condemner unless there was an agreement between the parties that such fixtures would be reserved by the owner and not taken into consideration in the condemnation proceeding. City of St. Louis v. St. Louis, I.M. & S. Railway Co., 266 Mo. 694, 182 S.W. 750, 754, L.R.A. 1916D, 713, Ann. Cas. 1918B, 881. Evidently such an agreement was made, because the opinion of the Court of Appeals states that the house, barn, and fences were not condemned. Such a thing could not have happened except by agreement of the parties because the fixtures were a part of the realty and could not be separated therefrom except by agreement. City of Kansas v. Morse, 105 Mo. 510, 519, 16 S.W. 893. Absent an agreement between the parties, the highway department would have been required to pay for the fixtures and remove them from the highway at its own expense. But where, as here, by agreement between the parties, the landowners reserve the fixtures and remove them from the highway, the cost of such removal is governed by the agreement between the parties, either express or implied, and not by the law governing the assessment of damages in condemnation. In this situation the landowner could not recover the cost of removing the fixtures

Honorable Max B. Benne

from the condemned land unless the agreement between the parties so provided. Whether or not the agreement did so provide is not an open question here. The trial court instructed the jury that the landowners were entitled to recover the cost of removing the fixtures in addition to the value of the land taken and the damages to the remainder tract. This was a good instruction if there was evidence upon which to base it.* * *" (Emphasis ours).

Thus, in the absence of agreement otherwise, the state or county, in condemning a right of way, would acquire those fixtures upon the right of way. Therefore, if the county or state wants such fixtures removed, the expense of removal must be borne by the state or county.

However, if the condemning authority does not want the poles in question, and the public utility wishes to retain such poles, the cost of removal thereof from the condemned land can be recovered by the utility.

CONCLUSION

In the premises, therefore, it is the opinion of this office that in the absence of agreement between the parties to a condemnation suit to the contrary, fixtures attached to land condemned pass to the condemner. And, if the condemner wishes such fixtures removed, it must bear the expense of removal of said fixtures. If, however, the condemning authority does not want said fixtures, and the owner of the fixtures wishes to retain ownership thereof, the cost of removal would be upon the condemning authority.

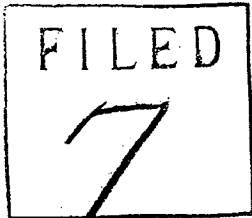
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON
Attorney General

PMcG:vlw

MOTOR VEHICLE: "Farm Wagon" drawn on highways by farm
TRAILER: tractors not required to be registered as
FARM VEHICLES: motor vehicle or motor vehicle trailer.



April 20, 1954

Honorable Max B. Benne
Prosecuting Attorney
Atchison County,
Rock Port, Missouri

Dear Mr. Benne:

Reference is made to your request for an official
opinion of this department reading as follows:

"Our local law enforcement officials
including myself and our magistrate are
at present uncertain as to whether or not
a farmer who owns or farms two or more
noncontiguous tracts of land so situated
that travel from one to the other can be
performed by using a public highway,
must purchase a trailer license for
either a metal or rubber tired farm wagon
pulled behind a farm tractor and used only
for the purpose of hauling seed, feed, or
other farm products and equipment from one
of his farms to another.

"The Highway Patrol or the Department of
Revenue has change is (its) policy recently
and now asserts that a license is necessary
for the wagon but not for the farm tractor.
Their construction would seem to be correct
insofar as the wagon is concerned except
that under Chapter 301, RS, Missouri, it is
provided as follows:

"301.010 (27) "Trailer," any vehicle
without * * *

(28) "Vehicle," any mechanical
device on wheels, designed primarily for
use on highways except * * *" (emphasis
mine.)

Honorable Max B. Benne

"It is my thought that today nearly all merchandise moved on the highway is moved by truck and the average farm wagon, unlike twenty-five years ago is used almost exclusively for field and barnyard conveyances and seldom on the road, and a fair construction of the above statute may exclude wagons from the above section of the statute .

"In addition to the questions by the above officials I have had many inquiries by private citizens, and I believe that an official opinion by your office would do much to clarify the situation."

Paragraph (27) of Section 301.010, RSMo 1949, Cumulative Supplement, 1951, fully quoted, defines "trailer" in the following language;

"Trailer, any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by self-propelled vehicle, except those running exclusively on tracks, including a semi-trailer or vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle; * *"

Further, Paragraph (28) of the same section contains the following definition of the word "vehicle."

"Vehicle, any mechanical device on wheels, designed primarily for use on highways, except those propelled or drawn by human power, or those used exclusively on fixed rails or tracks."

The above definitions have been quoted fully inasmuch as it is felt further light on this question may be drawn from their full context. It is also believed that further statutory definitions should be considered in order to better understand the meaning of the registration law in relation

Honorable Max B. Benne

to farm wagons. For instance, a trailer is defined as a vehicle to be drawn by a self-propelled vehicle. "Vehicle" is in turn defined as a mechanical device on wheels designed primarily for use upon the highway. Reference should be made here to the motive power of the wagon described in the opinion request letter. "Tractor" is further defined in two places in the statute. As a farm tractor, the words are defined in Paragraph (5) of Section 301.010 of the 1953 Cumulative Supplement as follows:

"'Farm tractor' a tractor used exclusively for agricultural purposes:"

and in Paragraph (26) of the same section "tractor" is defined as follows:

"Tractor," any motor vehicle designed primarily for agricultural use or used as a traveling power plant or for drawing other vehicles or farm or road building implements and having no provision for carrying loads independently."

Neither one of these above may be considered as designed primarily for use on highways. Further statutory reference to farm tractors is found in Section 304.260, RSMo, 1949 which provides as follows:

"Farm tractors when using the highways in traveling from one field or farm to another, or to or from places of delivery or repair are exempt from the provisions of the law relating to registration and display of number plates, but shall comply with all the other provisions hereof. The state highway commission shall have the power and authority to prescribe the type of road upon which such tractors may be used and may exclude the use of such tractors or the use of trucks of any particular weight from the use of certain designated roads or types of roads, by the posting of signs along or upon such roads or any part thereof."

The express terms of this section specifically exempt the use of farm tractors, as described in the opinion request letter, from registration.

Honorable Max B. Benne

The section providing for the amount of registration fee to be paid by vehicles, Section 301.060, Laws of 1951, page 695, provides for the licensing and registration of trailers in Paragraph (7) at l. c. 700 as follows:

"For each trailer or semitrailer there shall be paid an annual fee of seven dollars, and in addition thereto such permit fees authorized by law against trailers used in combination with tractors operated under the supervision of the Public Service Commission. The fees for tractors used in any combination with trailers or semitrailers or both trailers and semitrailers (other than on passenger carrying trailers or semitrailers) shall be computed on the total gross weight of the vehicles in the combination with load." (Emphasis ours)

Since all of the terms of the foregoing licensing must be interpreted strictly against the licensing authority which is in this case the State of Missouri, it must be concluded that there is no provision of the registration law applying to the licensing of farm wagons which are drawn by farm tractors.

From the quoted statutes above it must be conceded that the Legislature intended to exempt these wagons by the words "designed primarily for use upon the highway."

CONCLUSION

Therefore, it is the opinion of this department that a metal or rubber tired farm wagon is not such a "vehicle" within the meaning of Paragraph 28, of Section 301.010, RSMo 1949, Cumulative Supplement 1951, or trailer as defined in Paragraph 27, that it be required to be licensed.

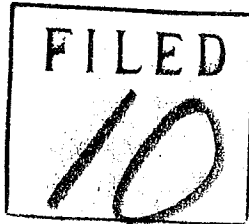
The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Faris.

Yours very truly

JOHN M. DALTON
ATTORNEY GENERAL

CLERK OF PROBATE COURT:

No salary provided for clerk of probate court in county of third class having population in excess of 10,750 but less than 15,000 inhabitants with a valuation of \$11,000,000.



March 26, 1954

Honorable Gordon R. Boyer
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department which we have summarized in the following language:

May a person serving as clerk of the probate and magistrate courts in a county of the third class having a population in excess of 10,750 but less than 15,000 persons with an assessed valuation in excess of \$11,000,000, receive any salary as clerk of probate court?

Provision for the appointment of clerks of probate courts has been made by Section 26, Article V, Constitution of Missouri, 1945, which reads as follows:

"Clerks of appellate and probate courts.--Appellate and probate courts shall appoint their own clerks."

As also bearing upon the subject matter of your inquiry we direct your attention to Section 17, Article V of the Constitution of Missouri, 1945, which reads as follows:

"Probate courts--uniformity--clerks.
--Probate courts shall be courts of record and uniform in their organization,

Honorable Gordon R. Boyer

jurisdiction and practice, except that a separate clerk may be provided for, or the judge may be required to act ex officio as his own clerk."

In providing for clerks of probate courts in certain counties, the General Assembly has enacted what is now Section 483.475,

"Probate clerks, assistants and stenographers--compensation

"1. In all counties now or hereafter having more than thirty thousand inhabitants, the probate judges shall appoint their own clerks, assistants and stenographers, and shall determine their number and their salaries by order of record and may remove them when in the discretion of such judges it is deemed advisable. All salaries of such judges and their appointees shall be paid monthly by the county, upon requisition issued by the judge of such court.
* * *

Further provisions of the statute provide for appointment of clerks of probate courts in various other populations and assessed valuation categories, but at no place does there appear any provision for the appointment of a clerk of the probate court in a county of the population and assessed valuation as Barton County.

It appears that the scheme for the payment of clerks of probate courts in counties similarly situated has been integrated with the provisions for the establishment of magistrate courts in such counties. We direct your attention to Section 482.010, RSMo 1949, particularly Paragraph 2 thereof, which reads, in part, as follows:

"2. In counties of thirty thousand inhabitants or less the probate judge shall be the judge of the magistrate court. * * *

Having placed the duties of the magistrate court upon the judges of probate in counties of less than 30,000 inhabitants, further provision is made for the appointment of clerks of

Honorable Gordon R. Boyer

such courts by Section 483.485, RSMo 1949, which reads in part, as follows:

"Clerks and deputies appointed by magistrate--compensation--oath--bond--duties.--In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. * * *"

Further provision for the payment of salaries of such clerks has been made under the provisions of Section 483.490, RSMo 1949, as amended by House Bill No. 431, Paragraph 1, of the 67th General Assembly.

We direct your attention as being applicable to counties of the category in which Barton County is situated by virtue of its population and assessed valuation to Sub-paragraph 4 of said Section 483.490, V.A.M.S., Pocket Parts, as amended.

"Salaries of clerks and deputy clerks to be paid by state--exceptions--salaries, how determined

* * *

"(4) In all counties now or hereafter having a population of more than ten thousand seven hundred and fifty inhabitants but not more than fifteen thousand inhabitants, with an assessed valuation of more than eleven million dollars, the sum of two thousand one hundred dollars; * * *."

From the foregoing we are persuaded to the belief that the salary provided for the clerk of the magistrate court is exclusive when such person also discharges the duties of clerk of the probate court. No additional salary for such latter services is allowed under the statutes.

Honorable Gordon R. Boyer

CONCLUSION

In the premises we are of the opinion that a person serving as clerk of the probate court in a county of the third class having a population between 10,750 and 15,000 inhabitants, with an assessed valuation in excess of \$11,000,000 is not entitled to any salary as such clerk. If such person is also designated as clerk of the magistrate court under the provisions of Section 483.485, RSMo 1949, the compensation is payable for services in that capacity.

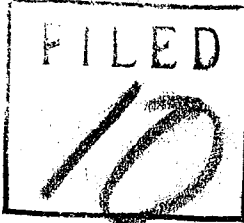
The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB:vlw

MOTOR VEHICLES: Provisions relating to mechanical signalling
CRIMINAL LAW: devices as described in Section 304.019, RSMo
Cum. Supp. 1953, are applicable only to new
vehicles registered in Missouri subsequent to
January 1, 1954.



September 3, 1954

Honorable Gordon R. Boyer
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"Section 304.019 amended laws of 1953 pro-
vides as follows:

"(4) The signals herein required shall
be given either by means of the hand and
arm or by a signal light or signal device
in good mechanical condition of a type
approved by the state highway patrol; how-
ever, when a vehicle is so constructed or
loaded that a hand and arm signal would
not be visible both to the front and rear
of such vehicle then such signals shall be
given by such light or device. A vehicle
shall be considered as so constructed or
loaded that a hand and arm signal would
not be visible both to the front and rear
when the distance from the center of the
top of the steering post to the left out-
side limit of the body, cab or load exceeds
twenty-four inches, or when the distance
from the center of the top of the steering
post to the rear limit of the body or load
thereon exceeds fourteen feet, which limit
of fourteen feet shall apply to single
vehicles or combinations of vehicles. The
provisions of this subdivision shall not
apply to any trailer which does not inter-
fere with a clear view of the hand signals
of the operator or of the signalling device

Honorable Gordon R. Boyer

upon the vehicle pulling said trailer; provided further that the provisions of this section as far as mechanical devices on vehicles so constructed that a hand and arm signal would not be visible both to the front and rear of such vehicle as above provided shall only be applicable to new vehicles registered within this state after the first day of January, 1954." (Emphasis ours.)

"State Highway Patrol has issued an interpretation that if a vehicle is so constructed or loaded that a hand and arm signal can not be visible then the failure to have a signal light is a violation of the Statute regardless of when the vehicle was registered. It is my opinion that this is an interpretation which completely eliminates the last provided clause and that such interpretation is contrary to the Statute.

"In other words it is my opinion that the requirement for signal devices apply only to vehicles registered after January, 1, 1954.

"Will you please advise me if this is correct."

We here have a statute penal in nature for construction, unambiguous in its terms, and containing a proviso exempting from other portions of the statute certain motor vehicles. The statute quoted in your letter of inquiry, including the proviso appended thereto, contains clear and unambiguous language. In these circumstances, the application of rules of construction to ascertain the meaning of such statutes and the intent of the General Assembly in enacting the same is not required. In fact, to do so is beyond the province not only of this office but of the judicial branch of the government. We direct your attention to State v. Hawk, 228 S.W. 2d 785, where at page 789 we read:

"* * * The language of the statute is clear and unambiguous, and we have no right to read into it an intent which is contrary to the legislative intent made evident by the phraseology employed. * * *"

Honorable Gordon R. Boyer

The same rule extends to the interpretation of provisos, as was held in *Smith v. Pettis County*, 136 S.W. 2d 282, l.c. 287:

"* * * There is no such implication here when the proviso is considered as it reads which we must do. *St. Louis Public Service Co. v. Public Service Comm.*, 326 Mo. 1169, 34 S.W. 2d 486. The language is too plain to permit any construction. *State ex rel. Jacobsmeyer v. Thatcher*, 338 Mo. 622, 92 S.W. 2d 640. * * *"

This being a statute penal in nature, one further rule we believe should be brought to your attention. The rule applicable to statutes of this nature is that they must be construed strictly against the State and liberally with respect to persons said to have been guilty of their violation. We direct your attention to *State v. Dougherty*, 216 S.W. 2d 467, where at l.c. 471 we find the rule stated in the following language:

"!Criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof. No one is to be made subject to such statutes by implication.' * * *"

Applying the foregoing rules to the statute under consideration, particularly the proviso thereof, we find that such proviso has the effect of limiting the application of the statute, insofar as it relates to mechanical signalling devices, to such new vehicles as may be registered within the State of Missouri subsequent to the first day of January, 1954.

CONCLUSION

In the premises, it is our opinion that the provisions relating to mechanical signalling devices as described in Section 304.019, RSMo Cum. Supp. 1953, are applicable only to new vehicles registered in the State of Missouri subsequent to January 1, 1954.

Honorable Gordon R. Boyer

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

OPTOMETRISTS: A naturopath not licensed as a physician or surgeon
NATUROPATHS: in this state, is not authorized under Sec. 336.120
LICENSES: (1) to practice optometry without a certificate of
PROFESSIONS: registration from the State Board of Optometry.



October 4, 1954

Dr. J. R. Bockhorst
Secretary
Missouri State Board of Optometry
359 Paul Brown Building
St. Louis 1, Missouri

Dear Sir:

By your letter of September 16, 1954, you requested
an official opinion as follows:

"As Secretary-Treasurer of the Missouri
State Board of Optometry, I have been
instructed to seek an opinion from your
office relating to the following question;
Can a person claiming to be a 'Naturopath'
practice the examining and prescribing and
diagnosing of anomalies of the human eye,
claiming exemption from the operation of
the Optometry Law, under Section 336.120?

"The Board has received a complaint that
one, _____, of Warsaw, Missouri,
is practicing optometry without benefit of
license, claiming that he is a Naturopath.
We are further advised that the Prosecuting
Attorney of Benton County wishes to have an
opinion from your office, before he is will-
ing to take action against Mr. _____.

* * * * *

"It will be noted that the only physicians
and surgeons who have been deemed exempt
under the provisions of this chapter are
registered medical physicians, licensed
by the State Board of Medical Examiners
pursuant to the provisions of Chapter 334,
and osteopathic physicians licensed by the

Dr. J. R. Bockhorst:

State Board of Osteopathy pursuant to the provisions of Chapter 337."

* * * * *

All statutory citations are Revised Statutes of Missouri, 1949. Section 336.020 makes it unlawful to practice optometry in this State without a certificate of registration from the State Board of Optometry. The practice of optometry is defined by Section 336.010 to be:

"Any one of any combination of the following practices constitutes the practice of optometry:

"(1) The examination of the human eye, without the use of drugs, medicines or surgery, to ascertain the presence of defects or abnormal conditions which can be corrected by the use of lenses, prisms or ocular exercises,

"(2) The employment of objective or subjective mechanical means to determine the accommodative or refractive states of the human eye or the range of power of vision of the human eye.

"(3) The prescription or adaptation without use of drugs, medicines or surgery, of lenses, prisms, or ocular exercises to correct defects or abnormal conditions of the human eye or to adjust the human eye to the conditions of special occupation. No registered apprentice may independently practice optometry. A registered apprentice may, however, under the immediate personal supervision of a registered optometrist, assist a registered optometrist in the practice of optometry."

Section 336.120 provides, in part, as follows:

"Persons exempt from operation of law.--
The following persons, firms and corporations are exempt from the operation of the provisions of this chapter except the provisions of section 336.200:

Dr. J. R. Bockhorst:

"(1) Physicians or surgeons of any school lawfully entitled to practice in this state;"

The word "physician" is defined in 70 C.J.S., paragraph 1, pages 813, 814, as follows:

"A word derived from the Greek word 'phusis,' meaning nature, and defined as one authorized to prescribe remedies for and treat diseases; one learned in the ancient art of relief of bodily ills; one lawfully engaged in the practice of medicine; one skilled in both medicine and surgery; one versed in, or practicing the art of, medicine; one who practices the art of healing disease and preserving health; one who professes or practices medicine, or the healing art; one whose profession it is to prescribe and administer medicine in the treatment of disease, or the relief of the sick, after diagnosing the complaint; a person skilled in physic or the art of healing; one duly authorized to treat diseases, especially by medicines; a doctor of medicine; a person who has received the degree of doctor of medicine from an incorporated institution. It is the broadest term our language contains applicable to one who practices medicine, including both medicine and surgery in its original meaning. It is not limited to the disciples of any particular school, but is of very wide significance, and includes many specialists within the field of medicine. It may, but does not always, include dentists. While it has been said that 'physician' includes the term 'surgeon,' it has also been said that a physician is often distinguished from a surgeon."

The word "surgeon" is defined by 70 C.J.S., paragraph 1, page 816, as follows:

"A physician who treats bodily injuries and ills by manual operation and the use of surgical instruments and appliances; one whose profession or occupation is to cure diseases or injuries of the body by manual operation; one who practices surgery."

Dr. J. R. Bockhorst:

Both of the above connote persons who profess to cure or treat the sick. It is made unlawful to profess to cure and attempt to treat the sick unless licensed to do so. This provision is made by Section 334.010:

"Practitioner shall be registered physician.-- It shall be unlawful for any person not now a registered physician within the meaning of the law to practice medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of midwifery in the state of Missouri, except as herein provided."

Exceptions from the above are made by Section 334.150, which reads:

"Sections 334.010 to 334.180 not applicable to certain persons.-- It is not intended by sections 334.010 to 334.180 to prohibit gratuitous service to and treatment of the afflicted, and sections 334.010 to 334.180 shall not apply to commissioned surgeons of the United States army, navy, and United States public health service while in the performance of their official duties, nor to any licensed practitioner of medicine and surgery in a border state attending the sick in this state; provided, he does not maintain an office or appointed place to meet patients or receive calls within the limits of this state; and provided, that such practitioner comply with the statutes of Missouri and the rules and regulations of the department of public health and welfare relating to the reports of births, deaths and contagious diseases, nor shall said section apply to the provisions of chapter 337, RSMo 1949. And sections 334.010 to 334.180 shall not apply to persons who endeavor to cure or prevent disease or suffering by spiritual means or prayer; provided, that quarantine regulations relating to contagious disease are not infringed upon;

Dr. J. R. Bockhorst:

provided further, that no provision of this section shall be construed or held to in any way with the enforcement of the rules and regulations adopted and approved by the division of health of the state department of public health and welfare or any municipality under the laws of this state for the control of infectious or contagious diseases."

The laws of Missouri also provide for the licensing and regulation of chiropodists, chiropractors, dentists, and osteopaths, as well as practitioners of medicine. Those professions are either expressly or impliedly exempt from the operation of Section 334.010 et seq. within the particular field of each profession. However, we nowhere find an exemption from Section 334.010 for naturopaths, nor do we find any provision for licensing of naturopaths as such. Therefore, we must conclude that naturopaths are not lawfully entitled to practice as such in the State of Missouri, and the exemption contained in Section 336.120 (1) is not applicable.

CONCLUSION

It is, therefore, the opinion of this office that a naturopath, not licensed as a physician or surgeon in this state, is not authorized under Section 336.120 (1) to practice optometry without a certificate of registration from the State Board of Optometry.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

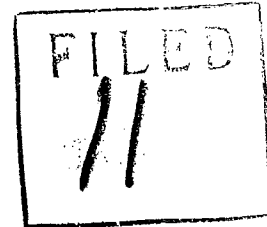
JOHN M. DALTON
Attorney General

PMcG:da:irk

TAX: (1) There is no specific time limitation as to when
SCHOOLS: the clerk of the county court may turn over the supplemental tax book to the county collector to collect taxes authorized by a special tax levy election (2) Taxes authorized by special tax levy election become delinquent on January 1st of the year following the levy (3) Such taxes constitute a lien on the assessable real property in the district, and (4) Payment of those school taxes due at the time of payment, does not preclude collection from those taxpayers of the additional taxes due by virtue of the tax levy election.

January 11, 1954

Honorable Edwin F. Brady
Prosecuting Attorney
Benton County
Warsaw, Missouri



Dear Sir:

Your letter of December 1, 1953, requesting an official opinion, reads in part as follows:

"A tax levy was authorized by the voters of Reorganized School District No. 6 of Benton County, Missouri, at a special election held in said district on November 30, 1953.

1 - "Is the county clerk required by law to and should he make a supplemental tax book for 1953 and extend this additional tax levy and deliver it to the county collector for collection?

2 - "If he should do so, what is the latest date that he is authorized to turn this supplemental tax book over to the county collector?

3 - "When will the taxes extended in this supplemental tax book for 1953 be delinquent? Will they become delinquent on January 1, 1954, as other 1953 taxes?

Honorable Edwin F. Brady

4 - "Some considerable amount of 1953 taxes on real estate and personal property in Reorganized School District No. 6 of Benton County have already been paid, and some taxpayers take the position that since they have a receipt for 1953 taxes, including school taxes, that they cannot be required to pay any additional 1953 school taxes. In your opinion, would this relieve taxpayers of paying this additional school tax?

5 - "The county collector also specifically desires to be advised whether this tax is a lien on the property assessed the same as other taxes."

The questions in your letter have been numbered for convenient reference.

All statutory citations are RSMo 1949, unless otherwise noted.

Your question No. 1 has been answered by a previous opinion of this office, rendered on October 7, 1953, to Hon. Donald P. Thomasson, Prosecuting Attorney of Bollinger County. That opinion has been sent to you under separate cover.

Statutory implementation of Article X, Sec. 11(c), Constitution of Missouri, 1945, (amended November 7, 1950), has been made by Section 165.080, Cumulative Supplement, 1951, which reads as follows:

"165.080. Tax levy for maintaining schools increased, how.--Whenever it shall become necessary, in the judgment of the board of directors or board of education of any school district in this state, to increase the annual rate of taxation, authorized by the constitution for district purposes without voter approval, or when a number of the qualified voters of the district equal to ten per cent or more of the number casting their votes for the directors of the school board at the last school election in said district shall petition the board, in writing, for an increase of said rate, such board shall

Honorable Edwin F. Brady

determine the rate of taxation necessary to be levied in excess of said authorized rate, and the purpose or purposes for which such increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective, and shall submit to the qualified voters of the district, at the annual school meeting or election, or at a special meeting or election called and held for that purpose, at the usual place or places of holding elections for members of such board, whether the rate of taxation shall be increased as proposed by said board, due notice having been given as required by section 165.200; and if the necessary majority of the qualified voters voting thereon, as required by article X, section 11 of the constitution, shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, and the number of years said rate is to be effective, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law. (Emphasis ours).

Thus, the above section contemplates the immediate certification of the tax levy to the county clerk, who shall upon receipt thereof proceed to assess and carry out the amount so returned on the tax books. No specific time limitations have been set for the carrying out of such duty by the county clerk. Therefore, the use of the phrase "on receipt thereof" can only be construed to mean that the duty must be performed as soon after receipt as is reasonably possible. Therefore, the answer to your question No. 2 is: There is no specific date beyond which the county clerk cannot turn over the supplemental tax book to the county collector, but such book should be turned

Honorable Edwin F. Brady

over as soon as is reasonably possible after receipt by the county clerk of the result of the vote on the tax levy increase.

Section 140.010 declares all real property taxes to become delinquent on January 1, and establishes a lien therefor:

"140.010. County collector--enforcement of state's lien.--All real estate upon which the taxes remain unpaid on the first day of January, annually, shall be deemed delinquent, and the said county collector shall proceed to enforce the lien of the state thereon, as required by this chapter; and any failure to properly return the delinquent list, as required by this chapter, shall in no way affect the validity of the assessment and levy of taxes, nor of the judgment and sale by which the collection of the same may be enforced, nor in any manner to affect the lien of the state on such delinquent real estate for the taxes unpaid thereon."

Personal taxes are declared to become delinquent on January 1, by Section 140.730(3).

"3. For the purpose of this chapter, personal tax bills shall become delinquent on the first day of January following the day when said bills are placed in the hands of the collector, and suits thereon may be instituted on and after the first day of February following, and within five years from said day."

There is no lien upon personal property for taxes assessed against its owner. State v. Rowse, 49 Mo. 586, 592.

Since there is no statutory provision for changing the date of delinquency, nor provision excepting the type of tax in question from establishing a lien on the assessable property, it must be concluded that the tax in question becomes delinquent on January 1, 1954, and that a lien for the amount of such tax is established on the assessed property in the same manner as other taxes on real estate.

Honorable Edwin F. Brady

You state that a considerable number of persons have paid their real estate and personal taxes prior to the election authorizing the tax levy increase, and you inquire whether such persons by virtue of having paid, all of the taxes due at the time of payment, are exempt from payment of this tax levy increase. The answer to this question is: No.

There is no statutory or case law in Missouri as to the conclusiveness of a tax receipt upon the taxing body. 51 Am. Jur., paragraph 960, page 842, makes this statement as to the conclusiveness of such receipt:

" . . . Such a receipt may by statute be made conclusive evidence of payment, but it is clear that in the absence of such a statute, a tax receipt is not conclusive evidence of payment, and the adverse party may prove by any competent evidence that payment has not actually been made."

CONCLUSION

It is, therefore, the opinion of this office that

1 - There is no specific time limitation as to when the clerk of the county court may turn over the supplemental tax book to the county collector to collect taxes authorized by a special tax levy election

2 - Taxes authorized by special tax levy election become delinquent on January 1st of the year following the levy

3 - Such taxes constitute a lien on the assessable real property in the district, and

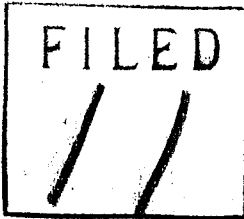
4 - Payment of those school taxes due at the time of payment of taxes does not preclude collection from those taxpayers of the additional taxes due by virtue of the tax levy election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON
Attorney General

SCHOOLS: School district cannot by method provided for
change of boundary lines absorb another entire
COUNTY COURT: district; new district, to be composed of two
entire districts, must have within its limits
COUNTY TREASURER: twenty persons of school age; attempted formation
of new district invalid so that county court has
no duty to assign number to proposed new district
and county treasurer has no duty to honor warrants
of new districts or to transfer funds of old
districts to proposed new district.



June 11, 1954

Honorable Edwin F. Brady
Prosecuting Attorney
Benton County
Warsaw, Missouri

Dear Mr. Brady:

This is in response to your request for opinion dated
April 28, 1954, which reads as follows:

"I have been requested by the County Court
of Benton County, Missouri, and the County
Treasurer of said county for an opinion
regarding the duties of said Court and said
county treasurer with respect to the school
district and school warrants hereinafter
mentioned. It is therefore requested that
you give me your opinion in regard to this
matter.

"Prior to March 22, 1954, a petition signed
by 20 qualified voters of School District
No. 90, which contains 7 persons of school
age, and School District No. 92, which con-
tains 10 persons of school age, in Benton
County, Missouri, was filed with the clerks
of the respective districts, praying for a
change of the boundaries of Dist. No. 90
so as to include all of Dist. No. 92. At
the annual school meetings of said districts
on April 6, 1954, the proposition presented
by said petition was approved by the voters
of both districts. Subsequently notices
were posted over 10 days prior to April 27,
1954, and on April 27, 1954, 21 days after
the action taken to form a new district by
changing the boundaries of Dist. No. 90 so
as to include Dist. No. 92, an election was
held, and a board of directors was elected

Honorable Edwin F. Brady

by the voters of the new district composed of former districts No. 90 and No. 92. Both districts lie wholly in Benton County.

"Section 165.170, RSMo 1949, provides the manner in which the boundaries of school districts may be changed and in which new districts may be formed or created, further providing that no new district shall be created or boundary line changed by which any district shall be formed containing within its limits less than 20 persons of school age. Section 165.193, RSMo 1949, provides that the voters of a newly created district shall assemble within the district within 15 days after the formation of the new district pursuant to notices being posted for 10 days prior to such meeting.

"Is it the duty of the County Court to assign a number to the district formed by the action of the voters of Dist. No. 90 and Dist. No. 92?

"Is it the duty of the county treasurer to transfer the funds of Dist. No. 90 and Dist. No. 92 to the credit of the new district and to honor warrants drawn by the board of the new district? If it is his duty to honor such warrants, should he do so without warrants being drawn by the boards of Dist. No. 90 and Dist. No. 92 for the transfer of such funds to the new district?"

Your precise questions relate to the respective duties of the county court and the county treasurer with regard to action taken by school districts Nos. 90 and 92 of Benton County. Their duties are necessarily dependent upon the validity and result of the action taken, which must be considered first before their duties can be determined.

It is not entirely clear from your request whether the voters approved a change of boundary lines or the formation of a new district. Section 165.170, RSMo 1949, provides that "When it is deemed necessary to form a new district, to be composed of two or more entire districts, or parts of two or more districts, to divide

Honorable Edwin F. Brady

one district to form two new districts from the territory therein, to divide one district and attach the territory thereof to adjoining districts, or to change the boundary lines of two or more districts," certain procedure shall be followed.

Assuming, however, that the petition, notices and ballot call for a change of boundary lines, we do not believe that the attempt accomplished anything because a school district cannot, under the guise of a change of boundaries, absorb another district.

In State ex rel. Consol. School Dist. No. 2 of Pike Co. v. Ingram, 2 S.W. (2d) 113, two consolidated districts had sought to change their boundary so that one would be absorbed in the other. The court pointed out that there are four things which a common district may do by election with regard to the territorial extent and status of the district. When deemed necessary and subject to certain conditions precedent it may hold an election: (1) To form a new district, to be composed of two or more entire districts, or parts of two or more entire districts; (2) to divide one district to form two new districts from the territory therein; (3) to divide one district and attach the territory thereof to adjoining districts; or (4) to change the boundary lines of two or more districts.

By virtue of another section of the 1919 Statutes (present Sec. 165.293, RSMo 1949), all the provisions of that section relating to the changes of boundary lines of common school districts were made applicable to consolidated districts. It had been previously held in State ex inf. v. Sweaney, 270 Mo. 685, 195 S.W. 714, that these four various contingencies were not coextensive and that a provision for a change of boundary lines did not provide a way for dividing one district into two new districts.

In the Pike County case, as here, the effect of the action taken was to form a new district out of the territory of two entire districts, but since the formation of a new district is entirely different from a change of boundary lines, which was all that was authorized for consolidated school districts, it could not be done by the method provided for the change of boundary lines. The court said, l.c. 115:

"In the case at bar, the end to be attained was confessedly that of permitting consolidated school district No. 4 to take over the

Honorable Edwin F. Brady

whole of the territory of consolidated school district No. 2, in consequence of which consolidated school district No. 2 could no longer continue to exist. Such being true, it is at once apparent, from what we have said above, that such proceeding could not properly be designated as a change of boundaries of the two districts, but that it necessarily fell within one of the other classifications embraced in section 11201, R.S. 1919. However, under section 11253, R.S. 1919, the provision of section 11201, R.S. 1919, relating to changes of boundaries, is the only one of the four provisions therein which can be held to apply to a consolidated school district. * * *

Since a change of boundary lines contemplates the continued existence of both districts after the change, if that was the method employed here we believe the action taken was void and of no effect.

As stated above, common districts may also hold an election for the purpose of forming a new district, to be composed of two or more entire districts. Such was the effect of the action taken here. However, in so doing the district is confronted with the plain proviso of Section 165.170, RSMo 1949, which says:

" * * * provided, however, that no new district shall be created or boundary line changed by which any district shall be formed containing within its limits by actual count less than twenty persons of school age, or by which any district shall be left containing within its limits by actual count less than twenty persons of school age; * * *"

Section 165.177, RSMo 1949, also states:

"No new school district shall be formed nor shall any school district be divided so that the new district formed or the territory left by the division of a district shall contain an assessed valuation of less than fifty thousand dollars and an enumeration of less than twenty persons of school age or at least eight square miles of territory and twenty persons of school age."

Honorable Edwin F. Brady

The argument can be made, of course, that where you have two districts with a total of less than twenty children of school age, both individually and combined, the districts are no worse off after the formation of the new district than they were before. Nevertheless, the plain wording of the provisos in Section 165.170, supra, and of Section 165.177, supra, admit of no exception and leave little room for argument. If the Legislature had seen fit to make an exception in cases such as this it could well have done so. Since it has not, we must conclude that any attempt to form a new district which has within its limits less than twenty persons of school age is void.

Therefore, regardless of whether the action taken by districts Nos. 90 and 92 was for a change of boundary lines or for the formation of a new district, in our opinion the attempt was invalid and of no effect. This being so, the districts exist as they did before the election and the county court has no duty to assign a number to the district thus attempted to be formed and the county treasurer has no duty to transfer the funds of districts Nos. 90 and 92 to the credit of the purported new district or to honor warrants drawn by the board of the purported new district.

CONCLUSION

It is the opinion of this office that a school district cannot by the method provided for change of boundary lines absorb another entire district; that a new district, to be composed of two entire districts, cannot be formed unless the new district will have within its limits at least twenty persons of school age; and that when either of these things is present so that the action in changing the boundary lines or forming the new district is illegal, hence void and of no effect, the county court has no duty to assign a number to the new district thus attempted to be formed and the county treasurer has no duty to transfer the funds of the two old districts to the purported new district or to honor warrants drawn by the board of the purported new district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

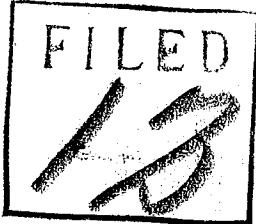
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

MOTOR VEHICLES:
CRIMES AND PUNISHMENT:
FORGERY:
FALSE AFFIDAVIT:

False application for certificate of ownership to a motor vehicle a forgery, when. False application also false affidavit under Section 557.090, 1949. Taking of false acknowledgment by notary violation of Section 561.220, Laws, 1952, page 420.



November 8, 1954

Honorable David G. Bryan
Supervisor, Motor Vehicle Registration
Department of Revenue
Jefferson City, Missouri

Dear Mr. Bryan:

In regard to your original opinion request dated December 8, 1953, and your subsequent letter in regard thereto, this office is deleting question 1 and 1a of the original request and is answering paragraphs 2 to 4, inclusive.

Your opinion request No. 2 is as follows:

"Many cases have come to our attention where the lien holder has attempted to repossess vehicles by unorthodox methods which we believe are used to circumvent our requirement that the vehicle must be titled in the true purchaser's name and tax paid thereon, when applicable, before issuing title to the repossessor. The unorthodox methods referred to consist of the lien holder determining the last person we have record of who held title to the vehicle and applying for a duplicate title in that name, later assigning it to themselves or directly to another purchaser. We have in several of these cases caused investigations to be made by the State Highway patrol, the results of which reveal that the signatures on the applications for duplicate titles were forged by the person or firm attempting to repossess in the unorthodox manner.

"2a. It is our considered opinion that forgeries of this nature have been committed for gain, and therefore perpetrators of such forgeries could be prosecuted.

Honorable David G. Bryan

"2b. May we respectfully request an opinion from your department as to whether such forgeries as described in paragraph 2 constitute fraud."

In regard to your question No. 2a as to whether such forgeries are committed for gain it is believed that Section 561.160 RSMo, 1949, is applicable, and reads as follows:

"Every person who, with intent to injure or defraud, shall falsely make, alter, forge or counterfeit any instrument or writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be or purport to be transferred, created, increased, discharged or diminished, or by which any rights or property whatsoever shall be or purport to be transferred, conveyed, discharged, increased or in any manner affected, the falsely making, altering, forging or counterfeiting of which is not herein declared to be a forgery in some other degree, shall, on conviction, be adjudged guilty of forgery in the third degree."

It definitely appears in accordance with the facts as set out in your opinion request No. 2, that a right to property, i. e., a motor vehicle, is purported to be transferred from the last person who had a certificate of ownership on record with the Department of Revenue, to either a purchaser from the lien holder or to the lien holder. It is presumed here that lien holder means the holder of a chattel mortgage upon the motor vehicle there concerned.

It is noted that there has been no compliance with Section 301.190, paragraph (1) which requires a certificate of ownership to be issued before a motor vehicle may be registered. Section 301.440, Laws of Mo. 1949, provides for a penalty and makes such a violation a misdemeanor. In the case of Pearl Interests Securities Company, 357 Mo. 160, 206 S. W. 2d 975, wherein a used car dealer executed assignment without the name of the assignee filled in, or without the acknowledgment before a notary public at the time of the transaction, the court, at l. c. 978, said:

"Plaintiff did obtain the title certificates with assignments thereon signed by each owner at the time the cars described therein were delivered to him as sections 8382 required. However, plaintiff did not

Honorable David G. Bryan

fully comply with the statute because he did not have the assignment of the certificates to him by the holders completed in the form prescribed by the Commissioner which included an acknowledgment before a notary. He had only an unacknowledged assignment, and this was not sufficient to vest the legal title in him. Although he was a notary he had no authority to take an acknowledgment on an assignment to himself as he said he intended to do. 1 Am. Jur. 334, 335, Secs. 52-53, 1. C.J.S. Acknowledgments Secs. 52-53. Nor would he or anyone else have had the right to fill in the name of Security, as assignee from the holders because he was the buyer and Section 8382 required the assignment to be made to him. To do so would be a misdemeanor. Sec. 8404(d), R.S. 1939, Mo. R.S.A. * * * *

Section 8404(d) is now Section 301.440, R. S. Mo. 1949, which makes a violation of Chapter 301 a misdemeanor.

In regard to the making of a false affidavit or certificate Section 557.070, RSMo. 1949, reads as follows:

"Every person who shall wilfully corruptly and falsely, before any officer authorized to administer oaths, under oath or affirmation, voluntarily make any false certificate, affidavit or statement of any nature, for any purpose, shall be deemed guilty of a misdemeanor, and shall upon conviction be punished by imprisonment in the county jail not less than six months, or by fine not less than five hundred dollars."

It is believed that your request in question No. 2a is for the purpose of determining just what criminal acts have transpired. It is believed that the above quoted Section makes it a misdemeanor to execute the affidavit necessary to obtain title. It seems that the perpetrators of the offenses outlined could be prosecuted under the above statute.

It appears that in accordance with the terms of Section 561.160, supra, the person who signed the name of the last owner of record to a spurious transfer could be found guilty of forgery

Honorable David G. Bryan

in the third degree. The election as to the proper charge would have to be made by the Prosecuting Attorney in accordance with the facts he had before him.

In answer to your Question No. 2b, undoubtedly such action constitutes fraud but unless the Criminal Laws provide for punishment therefor it would be a matter of civil liability only. The fraud is punishable as elements of the statutory crimes set forth in other answers herein.

Your opinion request No. 3 is as follows:

"3. It is our feeling that anyone forging a signature for the purpose of obtaining a duplicate title to a motor vehicle should be subject to prosecution whether for gain or not.

"3a. May we respectfully request an opinion from your department as to whether prosecution is recommended on forgeries as described in paragraph 3, when it may not be possible to prove that forgery was for gain."

Unless the evidence shows that, to again quote from Section 561.160, supra, "Any rights or property whatsoever shall be purported to be transferred, conveyed, discharged, increased or in any manner effected," there should certainly be no attempt made to prosecute the alleged offender for forgery, because it is necessary to be shown that the alleged forgery was perpetrated for one of the purposes as described in the statute for a conviction to be upheld. However, as was said in answer to your question 2a the facts and circumstances in each individual case should determine the question as to just which of the various possible violations of the law have been committed.

Your opinion request No. 4 is as follows:

"4. When we have an application for duplicate title on which the alleged owner's name has been forged then we are bound to have a questionable jurat inasmuch as said applications are required to be notarized. For your information we are enclosing form MMV No. 22 'Application for Duplicate Certificate of Title.'"

Honorable David G. Bryan

"4a. An opinion is respectfully requested from your department as to the seriousness and recommended procedure to be followed when a false jurat is indicated."

There is the following statement contained in the printed form for application of duplicate certificate of title:

"State of _____) ss. PERSONALLY APPEARED
County of _____) BEFORE ME, the under-
signed, this _____ day
of _____, 19____ the
above named

_____, who made oath in due form of law that the above statements are true.

Witness my hand and Official Seal _____

Notary
Public

My commission expires _____."

Section 561.220, Laws Mo. 1953, p. 421, makes it unlawful for any officer authorized by law to administer oaths or to affix his name to a false jurat. Section 561.220 is as follows:

"Section 561.220. Affixing false jurat-- penalty.-- 1. It shall be unlawful for any officer authorized by law to administer oaths to:

"(1) With or without his official seal to affix his name or permit another to affix his name to any jurat, certificate, attestation or any writing whatsoever whereby he attests or certifies, states or appears to state, that another person took or took and subscribed, a particular oath or made a particular affidavit, or swore to the truth of a particular statement, affidavit, application, certificate, writing, or pleading to be used or filed in any court or before any board, tribunal or officer of this or any other state, or of the United States, when no such oath was administered by him and taken in his presence.

Honorable David G. Bryan

"(2) With or without his official seal to affix his name or permit another to affix his name to any jurat, affidavit, statement, certificate, application, writing or pleading described in subdivision (1) while wholly or partly in blank.

"2. Any person violating any of the provisions of this section shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the penitentiary for not less than two years nor more than ten years or by imprisonment in the county jail for a term of not more than one year or by a fine of one thousand dollars or by both such fine and imprisonment.

"Approved May 2, 1953."

It is believed that the above section prescribes a penalty which covers the offense you describe in your question No. 4. Any notary public or other official who takes a false acknowledgment should be prosecuted and it is believed that this section is sufficiently broad to cover a set of facts such as you have stated in your request. The facts should be presented to the prosecuting attorney of the particular county in which the alleged violation occurred and we feel that it is incumbent upon the prosecuting attorney to select the particular crime in relation to the facts and file information or obtain an indictment against the offending party.

CONCLUSION

It is therefore the opinion of this office that the signing of the name of any previous owner to an application for a certificate of ownership by any person other than such previous owner constitutes forgery and such action is punishable under Section 561.160, RSMo 1949, as such. The same section is punishable as a misdemeanor under Section 557.070 for the making of a false affidavit. As to the offense to be charged against such violator the proper crime to be charged is a question for the prosecuting attorney and must be within his discretion. The attachment of a jurat by a notary public to a false affidavit known by him to be such is punishable as a graded felony under the provisions of Section 561.220, Laws Mo. 1953, p. 420.

Honorable David G. Bryan

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James W. Paris.

Yours very truly,

JOHN M. DALTON
Attorney General

JWF:DA

MORTGAGE:
DEED OF TRUST:
RECORDER OF DEEDS:
SATISFACTION OF RECORD:



A public official claiming a fee for performance of his duty must put his finger on the statute authorizing such fee; and that no statute authorizes the payment of a fee to a recorder of deeds for entering on the margin of the record the satisfaction of a mortgage or a deed of trust on realty.

February 1, 1954

Honorable Chas. B. Butler
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

By your letter of December 21, 1953, you requested an official opinion, reading in part, as follows:

"* * Recorder of Deeds here would like to have your opinion, if you please, whether or not a Recorder of Deeds can charge a fee for satisfying mortgages and deeds of trust on the margin of the record when the same covers real estate. * * *"

A previous opinion of this office rendered to Honorable Elmer Nicklin, Recorder of Deeds, Kennett, Missouri, dated August 28th, 1935, covering satisfaction of record on encumbrances on chattels, has been sent to you under separate cover. This opinion is to be restricted to the satisfaction of record of encumbrances on realty.

Public officials are entitled only to those fees specifically allowed by statute. The Supreme Court of Missouri in Nodaway County vs. Kidder, 344 Mo. 795, 129 S.W. (2d) 857, 1.c. 860 made this observation concerning compensation to public officials:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a

Honorable Chas. B. Butler

compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. * * *

The Kansas City Court of Appeals in Holman vs. City of Macon, 155 Mo. App. 398, 1.c. 402, 403, 137 S.W. 16 stated those principles in the following manner:

"* * * A recognized rule of statutory construction is that a public officer cannot demand any compensation for his services not specifically allowed by statute and that statutes fixing such compensation must be strictly construed. (State ex rel. v. Patterson, 152 Mo. App. 264, 132 S.W. 1183). * * *"

A thorough search of the statutes has disclosed no statute authorizing the recorder of deeds to charge a fee for noting on the margin, the satisfaction of a mortgage or deed of trust on realty on record.

Since the Legislature has authorized no fee to the recorder of deeds for noting on the margin of the record the satisfaction of the encumbrance recorded thereon, it must be concluded that no fee was intended for this service, other than the fee for recording the encumbrance in question.

CONCLUSION

It is, therefore, the opinion of this office that a public official claiming a fee for performance of his duty must put his finger on the statute authorizing such fee; and that no statute authorizes the payment of a fee to a recorder of deeds for entering on the margin of the record the satisfaction of a mortgage or a deed of trust on realty.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

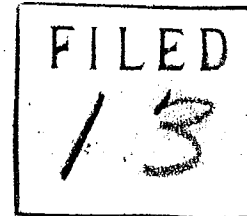
JOHN M. DALTON
Attorney General

LIQUOR CONTROL ACT:
INTOXICATING BEER
LICENSE:

A person who, on or since December 5, 1933, has been convicted of a violation of any law applicable to the manufacture or sale of intoxicating liquor, which includes 5% or intoxicating beer, cannot legally be granted by the supervisor of liquor control and license to sell intoxicating liquor or 5% or intoxicating beer; a person so convicted prior to December 5, 1933, is not debarred from securing such a license if he be found to possess the other necessary qualifications; a person convicted of the violation of a law not related to the manufacture or sale of intoxicating liquor or 5% or intoxicating beer, is not debarred from obtaining a liquor license if he possesses other necessary qualifications.

February 5, 1954

Honorable C. M. Buford
Prosecuting Attorney
Reynolds County,
Ellington, Missouri



Dear Mr. Buford:

Your recent request for an official opinion reads as follows:

"Has the liquor control board the authority to issue a beer license to a person who has been convicted of a misdemeanor?"

We assume that, when you use the word "beer" above, you refer to 5% beer, which the law declares to be intoxicating, and not to 3.2 beer, which is declared by law to be non-intoxicating, since the word "beer", without the word "non-intoxicating", commonly means 5% or intoxicating beer.

In your request you do not state whether the conviction for a misdemeanor was for a violation of the liquor law, or for the violation of some other law not related to the liquor law, hence we shall consider both situations. In an opinion rendered by this department on May 26, 1941, to Honorable C. Roy Noel, Supervisor Department of Liquor Control of Missouri, a copy of which opinion is enclosed, this department held that a license to sell intoxicating liquor, which includes 5% or intoxicating beer, may not be issued to a person who has been convicted, since the ratification of the 21st amendment to the Constitution of the United States, of a violation of any law applicable to the manufacture or sale of intoxicating liquor.

We here note that in the case of Wilson v. Burke, 202 S.W.(2d) 876, at l.c. 877, the Missouri Supreme Court in its opinion fixed the date of the ratification of the 21st amendment as being December 5, 1933. Since the statute, paragraph 1, Section 311.060 RSMo

Honorable C. M. Buford

1949, simply uses the words "convicted * * * of a violation * * * of any law applicable to the manufacture or sale of intoxicating liquor * * *", we assume that by the word "convicted" is meant "convicted of either a misdemeanor or a felony". In this regard we also note that in the case of Wilson v. Burke, supra, the court in its opinion held that where the legislature directed that no person be granted a liquor license who had been "convicted" of violating any law relating to the manufacture or sale of intoxicating liquor that (at l.c. 878): "The legislature has the right to ignore the manner in which the conviction was reached, whether upon trial, upon plea of guilty or nolo contendere". Therefore, it is the opinion of this department that any person, convicted of the violation of the provisions of any law relating to the manufacture or sale of intoxicating liquor, which would include 5% or intoxicating beer, on or after December 5, 1933, whether such a conviction was for a misdemeanor or a felony, cannot legally be issued a license by the supervisor of liquor control of Missouri to manufacture or sell intoxicating liquor, which would include 5% or intoxicating beer. By implication we deduce that a conviction for the violation of any law applicable to the manufacture or sale of intoxicating liquor, which conviction was prior to December 5, 1933, would not, of itself, effect such a disqualification to receive a license from the supervisor of liquor control to sell intoxicating liquor, which includes 5% or intoxicating beer. Let us now consider the effect upon the applicant for a license to sell intoxicating liquor or 5% or intoxicating beer of a conviction for the violation of a law not related to the law regarding the manufacture or sale of intoxicating liquor or 5% or intoxicating beer.

In an opinion rendered by this department on December 31, 1938, to Honorable E. J. McMahon, Supervisor of Liquor Control, a copy of which opinion is enclosed, this department held that "conviction for violation of laws other than liquor laws does not result in automatic revocation of liquor license." From this holding, that conviction for violation of a law other than the liquor law did not effect an automatic revocation of the liquor license, it would seem to follow that such a conviction would not, of itself, act as a bar to a person who was so convicted being granted a license by the Supervisor of Liquor Control to sell intoxicating liquor or 5% or intoxicating beer. This we believe to be a correct statement of the law.

The above discussion relates to automatic revocations of licenses and automatic bars to the procuring of a new license by a person previously convicted of a violation of the liquor laws. We may point out that Section 311.060 RSMo 1949, states that "No person shall be granted a license hereunder unless such person is of good moral character* * *."

Honorable C. M. Buford

Whether a person convicted, prior to December 5, 1933, for a violation of the liquor laws, or whether a person convicted at any time for the violation of any law not related to the liquor law, could under any circumstances be considered to be "a person of good moral character" would, we believe, be a matter to be determined at the discretion of the supervisor of liquor control. At least such a conviction would not, we believe, automatically debar a person from getting a license on the ground that he was not "of good moral character".

CONCLUSION

It is the opinion of this department that a person who, on or since December 5, 1933, has been convicted of a violation of any law applicable to the manufacture or sale of intoxicating liquor, which includes 5% or intoxicating beer, cannot legally be granted, by the supervisor of liquor control, a license to sell intoxicating liquor or 5% or intoxicating beer; a person convicted prior to December 5, 1933, of a misdemeanor relating to the manufacture or sale of intoxicating liquor is not debarred from securing such a license if he be found to possess the other necessary qualifications; a person convicted of a misdemeanor not related to the manufacture or sale of intoxicating liquor or 5% or intoxicating beer is not debarred from obtaining a liquor license if he possesses the other necessary qualifications.

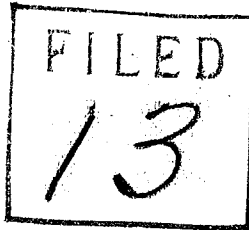
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

BOARD OF PROBATION & PAROLE: Grounds for recommending pardons
CRIMINAL LAW: to the Governor by the Board of
PARDONS: Probation and Parole.



March 11, 1954

Board of Probation and Parole
State of Missouri
Jefferson City, Missouri

Attention: Mr. Donald W. Bunker
Executive Secretary

Gentlemen:

This will acknowledge receipt of your request, which reads:

" _____, #26169 MSP, was committed to the Missouri State Penitentiary to serve a life sentence November 21, 1923 for the charge of first degree murder. He was seventeen years of age at the time of this offense. An English subject, he was paroled for the purpose of deportation September 24, 1935. He was returned to England and is still there.

"The subject, through his sister, _____ of New York City, has corresponded with the Board of Probation and Parole a number of times since September, 1938, in an effort to get a Governor's Pardon. He had been declared by the Immigration and Naturalization Service to be ineligible for re-entry into this country. It was thought that a pardon would remove the disabilities incurred by reason of the original conviction, and enable the subject to return to this country and become a citizen.

"The sister is renewing the request for pardon.

"The Board of Probation and Parole has heretofore interpreted the term 'Pardon' to mean in one instance that the applicant for pardon

Board of Probation and Parole

will thereby be absolved of all guilt, and in the other instance to mean a complete Restoration of all Civil Rights.

"In the case of _____ no claim of innocence is made at this time. Therefore, the Board is not in a position to recommend complete pardon absolving _____ of guilt from the crime for which he is serving a life sentence.

"The fact that _____ has always been an alien in this country, the Board is not in a position to recommend to the Governor that he restore civil rights which the subject has never had.

"In the Attorney General's Survey of Release Procedures, Chapter 2 of Volume III, Pardon, the subject of 'Pardon for Reformation' is treated, and the following quotes are excerpts from that section:

"'A sentence may seem just when imposed. But circumstances change and the sentence which covers a long period of years may become unnecessary, harmful, and thus unjust . . .'

"'Every sentence is but a rough estimation into which enter problems related to the personality of the wrongdoer and conditions of the outside world . . .'

"'Cases are imaginable where a full and free pardon would be, sociologically and psychologically, the "juster" method . . .'

"'It is the practice of all nations to discharge most of their "lifers" when, after many years, the notoriety of their crime grows pale . . .'

"As we have found, the pardoning power has a number of uses other than 'to absolve of all guilt' and 'to restore civil rights.'

Board of Probation and Parole

"The Board of Probation and Parole would appreciate your opinion, before making a recommendation to the Governor, as to whether _____ can be pardoned for any one or more of the reasons stated above and quoted from the Attorney General's Survey of Release Procedures, Chapter 2 of Volume III, Pardon."

Under Section 7, Article IV, Constitution of Missouri, the Governor of this State may grant a pardon for all offenses save treason and cases of impeachment, subject only to the law as to the manner of complying for pardons. Said section reads:

"The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole."

Under Section 549.250, RSMo 1949, it becomes the duty of the Board of Probation and Parole to make recommendation to the Governor of any inmate who in its opinion may be eligible for pardon or when requested by the Governor to investigate and report on any applicant for a pardon. Said section reads:

"The board of probation and parole is hereby authorized and it shall be its duty to recommend to the governor for his consideration such inmates as in the opinion of the board may be eligible for pardon or commutation of sentence; or, on request of the governor, the board shall investigate and report to him with respect to any application for pardon, commutation of sentence, or reprieve."

In State ex rel. Oliver v. Hunt, 247 S.W. (2d) 967, 973, the court held that a pardon is an act of grace proceeding from power entrusted to the execution of laws, which exempts the individual on whom it is bestowed, from punishment that the law inflicts for a crime he has committed and further held that a

Board of Probation and Parole

pardon is conceived in mercy and is said to be in derogation of law. See also State ex rel. Stewart v. Blair, 203 S.W. (2d) 716, 718, 356 Mo. 790; State v. Brinkley, 193 S.W. (2d) 49, l.c. 58, 354 Mo. 1051.

In State v. Jacobson, 152 S.W. (2d) 1061, l.c. 1063, 138 A.L.R. 1154, the defendant took an appeal from a judgment sentencing him to five years in the penitentiary. The State filed a motion to dismiss his appeal because pending the appeal and while the defendant was incarcerated under said judgment, he was granted an unconditional pardon by the governor. The State contended by the defendant accepting the pardon, he waived the right of appeal. Said motion was overruled by the court and the court held that the defendant was entitled to an opportunity to remove the stigma from the judgment or conviction, the fact that he was convicted remains. The court further held that the essence of pardon is forgiveness or remission of penalty, and that pardon implies guilt and acceptance thereof a confession of guilt, and in so holding said:

"In Lime v. Blagg, 345 Mo. 1, 131 S.W. 2d. 583, 585, the court en banc gave approval to definitions of the term 'pardon,' as follows: 'A pardon as defined in 20 R.C.L. Sec. 1, p. 521, is "a declaration on record by the chief magistrate of a state or county that a person named is relieved from the legal consequences of a specific crime," or, as stated in 46 C.J. Sec. 1, p. 1181, "a pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed."' Moreover, 'as the very essence of a pardon is forgiveness or remission of penalty, a pardon implies guilt.' 46 C.J. Sec. 32, p. 1193. A pardon 'carries an imputation of guilt; acceptance a confession of it.' 20 R.C.L. Sec. 4, p. 523. (Italics ours.) A pardon 'affirms the verdict and disaffirms it not.' Searle v. Williams, Hob. 288, 293. These definitions and connotations point to the reason for the rule announced by the text. Accordingly, it has been held that a party may not accept a benefit based on the

Board of Probation and Parole

legality of a judgment, and thereafter be heard to complain that the judgment is erroneous. He may not so attack the judgment because by asking and accepting executive clemency he said, in effect, that he was rightly convicted. He may not admit guilt to escape imprisonment, and at the same time protest innocence to avoid payment of fine and costs. *Manlove v. State*, 153 Ind. 80, 53 N.E. 385; 2 Ency. Pl. & Pr. 173-182, and cases cited. But see *Highmy v. People*, 78 N.Y. 330, holding the fact that the accused had received a pardon would not authorize the dismissal of his writ of error because injury may be presumed from the judgment until reversed, as the infamy and discredit to which he is subjected by it will remain.

"(1) Do the facts of the instant case call for the application of the principle that the acceptance of a pardon amounts to a waiver of the defendant's rights on appeal? The instrument evidencing the pardon issued by the Governor (the deed or charter of pardon, as it is sometimes called) recites on its face that it was granted 'Upon the attached recommendation of the Board of Probation and Parole, and because of the fact that I am convinced that this man is not guilty. * * *' (*Italics ours.*) We need not pause to determine the legal effect of the italicized language. It is sufficient to say that it would be harsh and ironical to imply a confession of guilt from the fact of acceptance of such a pardon. It is sometimes the case that the only redress open to an innocent man is through a pardon. Here the Governor deemed defendant a fit subject for executive clemency because he thought him not guilty. There is no inconsistency whatever in the defendant accepting such a pardon and at the same time denying his guilt. For these reasons, a distinction may be drawn between the ordinary pardon, which is governed by the general rules hereinabove noted, and one where it affirmatively appears to have been granted because the Governor was satisfied of the innocence of the accused. * * *"

Board of Probation and Parole

The foregoing decision is conclusive that pardons are granted for other reasons than for the innocence of the accused.

Volume 67, C.J.S., Section 2, p. 565, provides that the Constitution of the State is a source of the governor's power to pardon and reads:

"The pardoning power is not inherent in any officer of the state, or any department of the state, but, instead, is a sovereign power inherent in the state or a governmental power inherent in the people who may, by constitutional provision, confer it on any officer or department as they see fit. The constitution of a state is, of course, the source of the governor's power to grant pardons when such power is conferred on him by the constitution. While it has been said that there are many reasons why a power of this kind should be confined to the highest executive officer, and that it is not a judicial power, it has also been asserted that it is neither naturally nor necessarily an executive function. At any rate, the power of the governor to grant pardons, when conferred on him by the constitution of the state, discussed *infra* Section 3b, is an executive power and function.

"The pardoning power, whether exercised under the federal or state constitution, is the same in its nature and effect as that exercised by the representatives of the English crown in this country in colonial times.

"The pardoning power is in derogation of the law, that is to say, if laws could always be enacted and administered so as to be just in every circumstance to which they are applied there would be no need of the pardoning power."

Volume 67, C.J.S., Section 6, p. 571, further states the general principle of law that the exercise of power to pardon is within the uncontrolled discretion of the officer within whom it is vested and reads:

Board of Probation and Parole

"The power of pardoning is founded on considerations of the public good, and is to be exercised on the ground that the public welfare, which is the legitimate object of all punishment, will be as well promoted by a suspension as by an execution of the sentence. It may also be used to the end that justice be done by correcting injustice, as where after-discovered facts convince the official or board invested with the power that there was no guilt or that other mistakes were made; but, not being a judicial process, it is not a corrective judicial process to remedy a wrong. A pardon is granted, not as a matter of right, but as a matter of grace bestowed by the government through its duly authorized officers or departments. It is, however, not a personal favor or a private act of grace from the individual happening to possess power; it is granted in the exercise of a public function or as an act in the interest of the public welfare. The exercise of the power lies in the absolute and uncontrolled discretion of the officer in whom it is vested."

As seen under the foregoing decision, constitutional provisions and statutes, a pardon may be granted regardless of whether the one seeking it may be completely innocent of the crime of which he was convicted. Frequently, pardons are granted upon grounds similar to those referred to in your letter comprising a part of the Attorney General's Survey of Criminal Procedures, Chapter 2, Volume III, on pardons.

The authority vested in the governor of this State to pardon is not restricted as to the grounds upon which a pardon may be granted, other than treason and cases of impeachment, so in fact this request boils down to whether you desire to recommend a pardon, even though you may be fairly well convinced that the applicant is not entirely innocent of the crime for which he was sentenced. This is a matter entirely within your discretion.

CONCLUSION

Therefore, it is the opinion of this department that in the case at bar you may recommend that a pardon be granted on

Board of Probation and Parole

other grounds than that the applicant is innocent of the commission of the crime for which he was sentenced and for which he is now incarcerated in the State Penitentiary. As hereinabove stated, this is a matter entirely within your discretion. Your recommendation may be as a result of many conditions and circumstances similar to those referred to in your request and taken from the Attorney General's Survey on pardons.

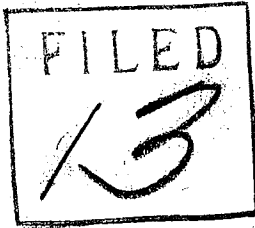
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

ARR:sm;ml

BOARD OF PROBATION Board of Probation and Parole may, in
AND PAROLE: its discretion, grant parole without
PAROLES: requiring personal interview.
PARDON AND PAROLE:



March 11, 1954

Honorable Donald W. Bunker
Executive Secretary
Board of Probation and Parole
Jefferson City, Missouri

Dear Mr. Bunker:

This is in response to your request for an opinion dated February 2, 1954, which reads, in part, as follows:

"When the Board of Probation and Parole has revoked the parole of an inmate released on parole from a Missouri State Correctional Institution as provided by Section 549.240 RS 1949 (said inmate having appeared and having been interviewed by the Board before the original Order of Parole was issued), may the Board of Probation and Parole reinstate the parole of said inmate while he is confined in a correctional institution of another state without first returning him to the Missouri institution?

"The procedure suggested by the question is occasionally indicated as a desirable one for the Board to follow. For example, a parolee with a parole supervision period of two years may abscond to another state and violate the law and receive a term of ten years in the other state correctional institution. After a few years, he may be considered to be a good subject for parole by the other State Board. If the Missouri Board has the authority to do so, it may reinstate the Missouri Parole Order and permit the subject to complete the Missouri parole concurrently with the parole from the other state, and in the other state.

Honorable Donald W. Bunker

This procedure is not only more economical in that it saves the cost of returning subject to Missouri, possibly from the State of California but it is often a real aid to the rehabilitation of the subject."

The question submitted requires an interpretation of Section 549.240, particularly that portion which we have underscored, which reads as follows:

"The board of probation and parole is hereby authorized to release on parole any person confined in any state correctional institution, except persons under sentence of death. All paroles shall issue upon order of the board and shall be recorded. Inmates shall be considered for parole upon the application of the prisoner or upon the initiative of the board. The board shall secure and consider all pertinent information regarding each inmate, except those under sentence of death, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment, attitude in the correctional institution, and reports of physical and mental examinations which have been made. Before ordering the parole of any inmate, the board shall have the inmate appear before it and shall interview him. A parole shall be ordered only for the best interest of society. A parole shall be considered a correctional treatment for any inmate and not an award of clemency. A parole shall not be considered to be a reduction of a sentence or a pardon. An inmate shall generally be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care and when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every inmate while on parole shall remain in the legal custody of the institution from which he was released, but shall be amenable to the orders of the board of probation and parole. Said board shall have the power and it shall be its duty when conditions so warrant to revoke or terminate any parole, and place the offender again

Honorable Donald W. Bunker

in the custody of the proper correctional institution. Said board may adopt such additional rules not inconsistent with the law as it may deem proper and necessary with respect to the eligibility of inmates for parole, the conduct of parole hearings, and conditions upon which inmates may be placed on parole. Each order for a parole issued shall contain the conditions thereof. All decisions of the board shall be by a majority vote." (Emphasis ours.)

At no place in the statutes do we find any authorization for the Board to reinstate a parole which has been previously revoked, therefore the reinstatement concerning which you inquire must be treated substantially as if it were an original proceeding.

The underscored portion of Section 549.240, supra, requiring a personal appearance before the Board and an interview before a parole is granted, is phrased in mandatory language. However, the language used is not always controlling in the construction of statutes, rather the legislative intent must be determined from all the terms and provisions of the act in relation to the subject of the legislation and the general object intended to be accomplished. Statutes, though phrased in mandatory terms, may be either directory or mandatory, depending upon the legislative intent which is derived from a construction of the act as a whole. Consideration must be given to the entire statute, its nature, its object, and the consequences which would result from construing it one way or the other. 82 C.J.S., Statutes, Section 376, page 869, et seq.

The most often quoted Missouri case on this subject generally is State ex rel. Ellis v. Brown, 326 Mo. 627, 33 S.W. (2d) 104. That case involved the construction of a statute which, by its terms, required that an applicant for registration as an absentee voter appear in person before the board of election commissioners on the Monday, Tuesday, or Wednesday of the first week prior to the election so that he might be further examined under oath and be by said board rejected or denied registration. The applicant in that case did not appear on one of the days specified but did appear on the following Friday. The court held that this provision of the act requiring that the applicant appear on one of the days designated was merely directory and not mandatory. However, the court did not hold that the requirement of appearance and interview was directory.

Honorable Donald W. Bunker

The court quoted the rule which is of general application in cases of this type as follows, S.W. 1.c. 107:

"A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory."

25 R.C.L. Sec. 14 pp. 766, 767.

The later case of Warrington v. Bobb, 56 S.W. (2d) 835 (St. Louis Court of Appeals), involved a statute which required voting registration lists to be "printed in plain, large type." The question was whether the registers could be copied by planographing. The court said, 1.c. 837:

"Of course our prime duty is to give effect to the legislative intent as expressed in the statute, and to that end there are many considerations to guide us. For instance, the object which the Legislature sought to attain by a statute, and the evil which it sought to remedy, may always be considered

Honorable Donald W. Bunker

to ascertain its intent and purpose (Straughan v. Meyers, 268 Mo. 580, 187 S.W. 1159; Ross v. Ry. Co., 111 Mo. 18, 19 S.W. 541); the court may consider the expediency of the law in ascertaining the legislative intent (State ex rel. v. Regan, 317 Mo. 1216, 298 S.W. 747, 55 A.L.R. 773); remedial statutes are not in all events to be taken literally, but are to be interpreted so as to give effect to the legislative purpose, and to such purpose is to be ascribed a reasonable and not a technical meaning (Cole v. Skrainka, 105 Mo. 303, 16 S.W. 491); it is to be borne in mind that laws are presumptively passed with a view to the welfare of the whole community (Gist v. Constr. Co., 224 Mo. 369, 123 S.W. 921); and in determining the legislative intent, and in effectuating the legislative purpose, words used may be either expanded or limited in the meaning so as to harmonize the law with reason (City of St. Louis v. Christian Brothers College, 257 Mo. 541, 165 S.W. 1057; Kerens v. St. Louis Union Tr. Co., 283 Mo. 601, 223 S.W. 645, 11 A.L.R. 288); and, in determining whether a statute is directory or mandatory, the prime object is to ascertain the legislative intention disclosed by the statutory terms and provisions in relation to the object of the legislation. Provisions relating to the essence of the thing to be done, that is, matters of substance, are mandatory, while, generally, statutory provisions not relating to the essence of the thing to be done, and as to which compliance is not a matter of substance, are directory. State ex rel. v. Brown, 326 Mo. 627, 33 S.W. (2d) 104, 107."

The court held that the object of the legislation was to safeguard elections in large cities and to prevent repeating, colonization, and other fraudulent abuses of the voting franchise. This being the basic purpose of the act, it was not the intention of the Legislature to direct the precise mechanics to be used in attaining the end result of preparing the lists in legible form in sufficient numbers to meet all demands nor did the Legislature have any intention "by the general language

Honorable Donald W. Bunker

used in the phraseology of the statute of precluding the subsequent use of new and improved methods of doing the required work by which substantial economies might be effected for the taxpayer." Holding the statute directory, the court said, l.c. 837:

"And we are all the more constrained to this conclusion from the view that the provision in question is, after all, but directory. The preparation of the lists in legible form and in sufficient numbers to meet all demands is the essence of the thing the statute requires to be done, and not the mechanics of their preparation, which is a matter of convenience rather than substance. * * * Such being true, does it not follow with even greater reason that the precise manner of the preparation of the lists was left to the sound discretion of the board of election commissioners, guided in their actions of course by the prime object to be accomplished, as set forth in section 10592 of the Rev. Stat. of Mo. 1929 (Mo. St. Ann. Sec. 10592)?"

This principle was reasserted in *State ex rel. v. Holmes*, 253 S.W. (2d) 402 (Mo. Sup.).

It is to be noted that the Legislature has not declared the consequences of a failure of the parole board to require a personal interview before granting a parole to an inmate of a correctional institution. Therefore, unless this provision is of the essence of this legislation, a failure to do so would not invalidate the parole.

The general object of the legislation appears to be the correction and rehabilitation of the inmate. It is specifically declared in the statute (Sec. 549.240, supra) that "a parole shall be considered a correctional treatment * * * and not an award of clemency." The board is given wide discretion in achieving this object and should not be hampered therein by unduly technical construction of the limited directions given in the statute for the procedure to be followed in granting paroles.

Of course, we are not to be understood as saying that the legislative directions to be followed in granting paroles are to be ignored. The board has the duty of following even merely

Honorable Donald W. Bunker

directory provisions of the statute insofar as practicable. State ex inf. Walker ex rel. Wagster v. Consolidated School Dist. No. 40 of Dunklin County, 358 Mo. 839, 217 S.W. (2d) 500; 82 C.J.S., Statutes, Section 374, page 869. The wisdom of doing so in this case under ordinary conditions is readily apparent.

However, if the Board of Probation and Parole in the exercise of its sound discretion feels that it can better achieve the general object of rehabilitation of a convicted criminal by placing on parole a convict who is on parole from an institution in another state without first requiring the return of such inmate to this state for a personal interview, it is the opinion of this office that it may do so.

CONCLUSION

It is the opinion of this office that when an inmate of a Missouri correctional institution has been granted a parole by the Board of Probation and Parole and permitted to go to another state where he is later convicted of a subsequent crime in such other state and his Missouri parole is revoked, the Board may, in its discretion, grant a second parole to such inmate without first requiring his return to this state for a personal interview.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

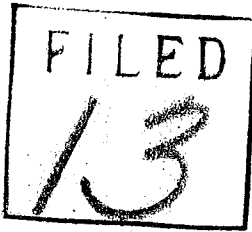
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

TAXATION:
MUNICIPALITIES:

Personal property located without the city limits but belonging to a resident of the city is subject to taxation for municipal purposes.



March 25, 1954

Honorable N. Elmer Butler
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which reads in part as follows:

"The owner of certain personal property lives in Reeds Spring, Missouri, which is a city of the fourth class. In addition to personal property within the city limits where he resides, he owns certain other personal property located outside the city limits in Stone County, Missouri. May the city assessor assess personal tangible property tax on such property being outside the corporate limits of the City of Reeds Spring; and may the collector collect such tax?"

In answer to this question we need only refer you to the case of State to use of Divine v. Collier, 301 Mo. 72, 256 S.W. 455.

The question presented in that case was whether personal property located without the corporate limits of a city of the fourth class was taxable by the city wherein the appellant resided. Suit was brought by the city collector to collect taxes against said property located without the city limits and the circuit court allowed recovery. The defendant in that action appealed to the Supreme Court, and in its opinion, insofar as it is pertinent to the question at hand, said:

"II. The stipulation heretofore set out, contains the following:

"The property forming the basis of the assessment upon which the levy for these

Hon. N. Elmer Butler

taxes was made consisted of horses, cattle, mules, sheep, hogs, implements and machinery owned by the defendant, and kept and used upon a farm owned by him located outside the corporate limits of the city of Greenfield, but within the boundaries of Dade County, Missouri, and not used in any way in connection with his home in Greenfield.'

"We are of the opinion that the trial court reached a correct conclusion in its disposition of this case and that its ruling is sustained by the following authorities: 26 R.C.L. sec. 241, pp. 273-4; State ex rel. v. Pearson, 273 Mo. l.c. 78, 199 S.W. l.c. 943-4; State ex rel. v. Shepherd, 218 Mo. 656-7.

"It is conceded in the foregoing stipulation that, 'defendant herein is an actual resident of said city(Greenfield), residing within the corporate limits thereof in which place he has resided for more than ten years.'

"The judgment below is accordingly affirmed."

We have reviewed this opinion and the authorities referred to therein and are of the opinion that the decision in that case is yet controlling. (See also State ex rel. v. Timbrook, 145 Mo. App. 368.)

CONCLUSION

Therefore, it is the opinion of this office that a city assessor of a city of the fourth class may assess and the collector may collect taxes upon personal property having an actual situs without the city limits but belonging to a person who resides therein.

This opinion, which I hereby approve, was written by my assistant, Mr. Donal D. Guffey.

Yours very truly,

DDG:mw

JOHN M. DALTON
Attorney General

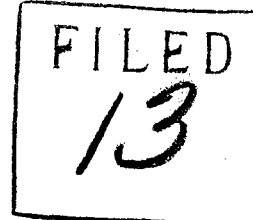
ELECTIONS:
CIVIL RIGHTS:
CONVICTS:
INTERMEDIATE REFORMATORY:

Person released from Intermediate reformatory by Governor's commutation in 1940 may have right to vote restored only by pardon; may not serve as juror until pardoned, if convicted of crimes listed in Sections 557.490, 559.470, 561.340, or if over twenty convicted of crimes listed in Section 560.160;

may not hold office of honor, trust, or profit if convicted of crimes listed in Sections 557.490, 558.130, 559.470, 561.340 and 564.710; or if over twenty years of age and convicted of one of the crimes listed in Section 560.610, unless he receives a pardon.

June 8, 1954

Honorable Donald W. Bunker
Executive Secretary
Board of Probation and Parole
Jefferson City, Missouri



Dear Sir:

This is in answer to your letter of recent date, requesting an official opinion of this office, reading as follows:

"The Board of Probation and Parole would appreciate your opinion relative to the following question pertaining to Section 9086 RSMo 1939, which is the 3/4ths Rule and provides for automatic restoration of civil rights in certain cases of penitentiary convicts; and Section 217.370 RSMo 1949, which is a revision of the 1939 Section extending the 3/4ths Rule and automatic restoration of civil rights in certain cases of convicts confined in the intermediate reformatory.

"May the civil disabilities of a former convict released from the intermediate reformatory via commutation of sentence signed by the Governor in 1940 be removed only on order of the Governor?"

Section 217.740 RSMo 1949, provides as follows:

"If any male person seventeen years of age and less than twenty-five years of age be convicted of a felony for the first time, and he be not guilty of treason or murder in the first or second degree, or any offense for which capital punishment is provided, the court trying such person may sentence him to the custody of the officials of the intermediate reformatory to be confined at said reformatory for the term prescribed by the statutes of this state and fixed by the court or jury as a punishment for such offense. It shall

Honorable Donald W. Bunker

be the duty of the officials in charge of said reformatory to receive all such convicted persons."

The Supreme Court of Missouri in the case of Anthony v. Kaiser, 169 S. W. (2d) 47, discussed the question of whether a person sentenced to the intermediate reformatory at Alcoa was sentenced to the penitentiary within the meaning of Section 222.010 RSMo 1949, which section provides as follows:

"A sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights of the persons so sentenced during the term thereof, and forfeits all public offices and trust, authority and power; and the person sentenced to such imprisonment for life shall thereafter be deemed civilly dead."

With reference to this the court said at l.c. 48:

"The statute appeared in its present form as Section 1668 of the Revised Statutes of 1879, and has ever since remained unchanged. It is one of three sections which comprise Article 1 of Chapter 49 R. S. '39. Mo. R.S.A. art. 1. c.49. The article is captioned 'Civil Rights of Convicts.' Section 9225, which immediately precedes the one in question, specifies the effect upon civil rights flowing from a 'sentence of imprisonment in the penitentiary.' Article II of the same chapter in relation to 'Estates of Convicts' is similarly restricted to those instances where 'sentence of imprisonment in the penitentiary' has been imposed. Kansas Statutes with reference to the forfeiture or suspension of civil rights of convicts, and which bear a strong analogy to the foregoing were held by the Supreme Court of that state to be inapplicable to one sentenced to the State Industrial Reformatory upon conviction for rape; the court saying, 'The judgment pronounced against him was simply "that he be sent to the state industrial reformatory at Hutchinson, Kan." His civil rights were not, therefore forfeited.* * *"

Therefore, such section has no application to a convict who was sentenced to the intermediate reformatory and released therefrom by commutation of the Governor.

Since Section 9086 RSMo 1939 refers only to persons sentenced to the penitentiary, and since the person about whom you write was released by reason of the commutation and not under the three-

Honorable Donald W. Bunker

fourths Rule, said section has no bearing on this matter.

Section 217.370 RSMo 1949, referred to in your letter, provides as follows:

"Any convict who is now or may hereafter be confined in the penitentiary or the intermediate reformatory and who shall serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any infraction of the rules of the institution or laws of the same recorded against such convict, shall be discharged in the same manner as if said convict had served full time for which sentenced, and in such case no pardon from the governor shall be required; and in all cases of first conviction of felony the civil disabilities incurred thereby shall cease at the end of two years from such discharge under the three-fourths rule, and such convict shall thereupon be restored to all the rights of citizenship; provided, that he or she shall not have been indicted, informed against by the prosecuting or circuit attorney, or convicted of any other crime, during such period, and shall obtain a certificate to that effect from the board of probation and parole, whose duty it shall be, upon proper showing, to issue the same and keep a record thereof."

The provisions of such section, relative to restoration of citizenship to persons released from the intermediate reformatory, are taken from Section 9120a, L. Mo. 1943, p.775. Since Section 9120a was enacted after the commutation in 1940, and since the person about whom you write, was released by reason of the commutation and not under the three-fourths Rule, Section 217.370 RSMo 1949 has no application to this matter.

We are enclosing an official opinion of this office rendered under date of April 19, 1954, to Clifford Jones, which holds that a commutation by the Governor does not have the effect of a pardon by the Governor.

Section 111.060 RSMo 1949, provides as follows:

"All citizens of the United States, including residents of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person shall

be entitled to vote at all elections by the people. Each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides. No idiot, no insane person and no person while kept in any poorhouse at public expense or while confined in any public prison shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of a felony, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

As is pointed out in the attached opinion, the right to vote of a person convicted of a felony is not restored by a commutation. Therefore, the person who received a commutation in 1940 from his sentence to the intermediate reformatory cannot vote at any election until he receives a pardon.

Section 557.490 RSMo 1949, provides as follows:

"Every person who shall be convicted of any perjury or subornation of perjury, punishable by any of the provisions of this chapter, shall thereafter be incompetent to serve as a juror in any cause, civil or criminal, and shall be disqualified from voting at any election, or holding any office of honor, profit or trust within this state."

If the person who received the commutation in 1940 was convicted of the crime of perjury or subornation of perjury, punishable by any of the provisions of Chapter 557 RSMo 1949, his right to serve as a juror, or hold an office of honor, trust or profit within the state, could be restored only by a pardon.

Section 558.130 RSMo 1949, provides as follows:

"Every person who shall be convicted of any of the offenses mentioned in sections 558.010 to 558.120 shall be forever disqualified from holding any office of honor, trust or profit under the constitution and laws of this state, and from voting at any election; and every officer who shall be convicted of any official misdemeanor or misconduct in office, or of any offense which is by this or any other statute punishable by disqualification to hold office, shall, in addition to the other punishment prescribed for such offenses, forfeit his office."

Honorable Donald W. Bunker

If the person who received the commutation in 1940 was sentenced to the intermediate reformatory for one of the offenses mentioned in Sections 558.010 to 558.120 he cannot hold any office of honor, trust or profit under the Constitutional laws of this state until he receives a pardon.

Section 559.470 RSMo 1949, provides as follows:

"Every person who shall be convicted of murder in either degree, or manslaughter as designated in sections 559.070, 559.080 or 559.090, or who shall be convicted and sentenced to the penitentiary for any of the offenses specified in sections 559.150, 559.180, 559.200, 559.260 to 559.290, 559.310, 559.320 and 563.060 RSMo 1949, shall be forever disqualified from voting at any election, or holding any office of honor, trust or profit under the laws of this state, or of any city or town thereof, or sitting as a juror in any case."

If the person who received the commutation in 1940 was sentenced to the intermediate reformatory for any of the causes listed in Section 559.470, his right to sit as a juror, or hold any office of honor, trust or profit in this state, or any city or town thereof, can be restored only by a pardon.

Section 560.610 RSMo 1949, provides as follows:

"Any person who shall be convicted of arson, burglary, robbery or grand larceny, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this chapter, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust or profit, within this state; provided, that the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years; provided further, that in all cases where persons have been convicted under this chapter the disqualification provided may be removed by the pardon of the governor any time after one year from the date of conviction."

If, therefore, the person who received a commutation in 1940 was twenty or over, and he was sentenced to the intermediate reformatory for one of the crimes listed in Section 560.610, his right to serve as a juror, or hold an office of honor, trust or profit within this state, can be restored only by a pardon.

Honorable Donald W. Bunker

Section 561.340 RSMo 1949, provides as follows:

"Every person who shall be convicted of any felony punishable by the provisions of sections 561.010 to 561.360 shall be incompetent to be sworn as a juror, and forever disqualified from voting at any election, or holding any office of honor, trust or profit within this state."

If the person who received the commutation in 1940 was sentenced to the intermediate reformatory because he was convicted of a felony, punishable by the provisions of Sections 561.010 to 561.360, his right to sit as a juror or hold any office of honor, trust or profit within this state, can be restored only by pardon.

Section 564.710 RSMo 1949, provides as follows:

"Every person who shall be convicted of any felony, punishable under any of the provisions of this chapter, shall be thereafter disqualified from holding any office of honor, profit or trust, or of voting at any election within this state."

If the person who received the commutation in 1940 was convicted of a felony, punishable under the provisions of Chapter 564 RSMo 1949, his right to hold any office of honor, profit or trust can be restored only by pardon.

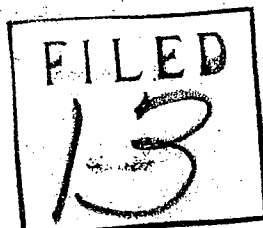
CONCLUSION

It is the opinion of this office that a person who was sentenced to the intermediate reformatory of Missouri and released therefrom by the Governor's commutation in 1940 cannot vote at any election until he receives a pardon from the Governor.

It is the further opinion of this office that such person cannot serve as a juror if he was sentenced to the reformatory because of being convicted of the crimes listed in Sections 557.490, 559.470, 561.340 or if he was over twenty years of age at the time of conviction or commission of one of the crimes listed in Section 560.610, until he receives a pardon from the Governor.

It is the further opinion of this office that such person cannot hold any office of honor, trust or profit, if he was con-

FIREWORKS: County court cannot regulate or prohibit sale
or use of fireworks, nor limit sale of fireworks
COUNTY COURT: to location with ~~sale~~ permit.



June 18, 1954

Honorable Hilary A. Bush
County Counselor
Suite 202 Court House
Kansas City, Missouri

Dear Mr. Bush:

This is in answer to your letter of recent date requesting
an official opinion of this office, reading as follows:

"In Jackson County, the promiscuous sale
of fireworks and the explosion thereof,
has developed to a point where it is en-
dangering the health, safety and general
welfare of the population of the county.
I would, therefore, like to request an
opinion from your office on the following
matters:

- (1) Can the County Court of Jackson
County make its order regulating or
prohibiting the sale of fireworks in
the unincorporated part of the county?
- (2) Can the County Court regulate the
use and explosion of fireworks within
the unincorporated area of the county?
- (3) Under the provisions of the Zoning
Law (Chapter 64 R.S.Mo. '49) can the
County Court limit the sale of fireworks
to locations for which a special permit
has been granted?"

There is no doubt but that the explosion of fireworks en-
dangers the lives and property of our citizens, and their
promiscuous use may be considered a nuisance in many respects.
However, in Missouri we do not have a general law either pro-
hibiting or regulating the use and sale of fireworks. On the

Honorable Hilary A. Bush

other hand, however, several of our cities have ordinances prohibiting or regulating such use and sale. These ordinances have been held valid on the grounds that the regulation of the use and sale of fireworks is a legitimate exercise of the police power. To quote from an opinion in the case of *City of Centralia v. Smith*, 77 S.W. 488, 103 Mo. App. 438:

" * * * We regard it as within the police power of the city to enact the ordinance (prohibiting the exploding of firecrackers). The notorious fact that fires, frightening of horses, serious accidents to both actors and spectators commonly follow such amusement, is ample and reasonable ground justifying the exercise of the supervisory restraining power of the municipality."

(Words in parentheses ours.)

However, there is a distinct difference between the power of a municipality in the exercise of its police power to prohibit or regulate the use and sale of fireworks, and the attempt to exercise such police power by a county court. It is well settled that a county court possesses and can exercise such powers, and such powers only, as are expressly conferred on it by the general law of the state, or such powers as arise by necessary implication from those expressly granted. See *Dumm v. Cole County*, 287 S.W. 445, 315 Mo. 568; *King v. Maries County*, 249 S.W. 418, 297 Mo. 488. The distinction between a city and county with reference to the exercise of police powers has been well stated in the case of *State ex rel. Audrain County v. City of Mexico*, 197 S.W. (2d) 301, where the court said:

"Counties and cities are subdivisions of the State. They have, however, certain fundamental legal distinctions. Counties are involuntary quasi public corporations of a local nature, created by general law and come into existence without regard to the wishes or consent of their respective inhabitants. They are not chartered corporations. They are created as a governmental agency to facilitate the administration of the laws of the State. They do not have political and legislative powers for local self-government. They have been said

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to rank low in the grade of corporate existence. Municipal corporations are the result of a voluntary association of the inhabitants sanctioned by the State primarily for the purpose of local self-government subordinate to the State and at the same time constituting, although secondary, an effective instrumentality for the administration of governmental affairs. A charter, defining their powers and duties, is essential to their creation and existence, which is effected upon 'incorporation.' Cities have been a chief factor in human progress. They exercise policy making authority and have legislative powers for their local government. It is inconsistent with the purposes of their creation that counties exercise jurisdiction over their affairs. Dual authority would tend to create confusion. This is especially true of an exercise of governmental police power. * * * (Emphasis ours.)

The authorities are uniform to the effect that county courts possess only limited jurisdiction. Outside the management of the fiscal affairs of the county (Art. VI, Sec. 7, Constitution of Missouri, 1945), such courts possess no powers except those conferred by statute. (See State v. Johnson, 173 S.W. (2d) 411.) The General Assembly of the State of Missouri has enacted numerous laws conferring administrative powers on the county courts. No law, however, has been enacted which delegates authority to a county court to legislate with respect to local matters relating to the health, safety and general welfare of the public.

In State ex inf. Wallach v. Loesch, 169 S.W. (2d) 675, 350 Mo. 989, the Planning and Zoning Act of 1941 was attacked on the ground, among others, that the act delegated to the county court and the planning commission legislative power in respect to police regulations, and thereby was in violation of the provisions of the constitution vesting the legislative power in the General Assembly. The court conceded that the Legislature must retain unto itself legislative power, and that it cannot delegate such power to the county courts. It was held that the act itself does not delegate any powers to the county courts in violation of our constitution, but that the law in question is a complete framework, but the county courts are given the power to fill in the details. Such details consist in part of rules and regulations to be adopted. In other words, the court concedes that the planning and zoning

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law, for counties outside incorporated areas is a police regulation, that such power may not be delegated to a county court, but holds that there is no delegation of police power to the county courts by the law because only certain details have been necessarily left to the local body to complete.

Chapter 64, V.A.M.S., is an exercise by the Legislature of the police power of the state, and only the essential details are left to the local administrative body. The law authorizes the segregation and fixing of locations of places of businesses, as well as the uses to which property may be put generally. Presumably any lawful business may be classified according to its hazardous nature and restrictions placed on its location by regulations. This does not imply that there is any power in the county court to prohibit or abate a lawful business though it may be considered a nuisance, but rather confers the power to classify, locate and regulate lawful businesses whether or not they are nuisances. The county court cannot abate and destroy a lawful business on the theory that it is not as conducive to public health and fire safety as some other lawful business. See *City of Washington v. Mueller*, 218 S.W. (2d) 801.

As to what ultimate zoning plan may be prepared and put into effect in Jackson County, we, of course, have no way of knowing. Whether or not businesses dealing exclusively with the sale of fireworks would be segregated to any particular area would be one of conjecture on our part. As the Supreme Court pointed out in *Flora Realty and Inv. Co. v. City of Ladue*, 246 S.W. (2d) 771, 362 Mo. 1025, what may be the most appropriate use of any particular property in determining zoning boundaries and restrictions depends not only on all conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which that region has been or may be put most advantageously. Certainly, restrictions imposed by zoning ordinances on use of property must bear some substantial relationship to public health, safety, morals or general welfare.

We are sympathetic with your views that the health, safety and welfare of the people of Jackson County are being endangered by the promiscuous sale of fireworks and the explosion thereof. As a practical matter, the danger resulting from throwing firecrackers at automobiles in 1954 is much greater than the danger resulting from throwing firecrackers at horses in 1903, noted by the court in the *Centralia* case. However, this must be a matter

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for the Legislature to act upon, and we are unable to find any authority for regulation other than by municipalities acting under the police power of their charters.

CONCLUSION

It is the opinion of this office that the county court of Jackson County does not have the power to prohibit or regulate the sale or use of fireworks in the unincorporated area of such county. It is further the opinion of this office that the county court of Jackson County cannot limit the sale of fireworks to locations for which a special permit has been granted.

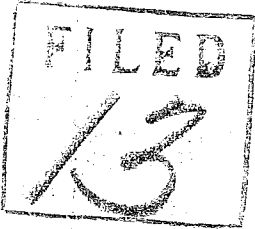
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Ronald S. Reed.

Yours very truly,

JOHN M. DALTON
Attorney General

RSR:ml

MAGISTRATES: Salaries of magistrate, clerk, deputy clerk and
COURTS: other employees in court of "additional magistrate"
COUNTIES: established pursuant to Section 18, Article V,
Constitution of Missouri 1945, to be paid by county
wherein located; and fees derived from operation
of such court to be retained by such county and
used for such purpose.



September 15, 1954

Honorable Hilary A. Bush
County Counselor, Jackson County
Suite 202 Courthouse
Kansas City, Missouri

Attention: Louis Wagner, Asst. County Counselor

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"During the early part of last year a petition for the creation of an additional magistrate district was filed in the Circuit Court in Independence, Missouri, and after a hearing the Court entered the decree creating such an additional district. Thereafter a magistrate and clerk were appointed in such district, and such magistrate, clerk and employees of that office have been paid by the County and the fees so collected have likewise been paid into the County.

"On January 1, 1955, an elected magistrate will assume his duties for such district for the first time. It has been the opinion of this office that since an additional magistrate was created under Section 482.150 R.S. Mo. '49 and the salary paid to such magistrate by the County, and since under Section 482.150 the County is obligated to pay for the additional magistrate and has assumed the obligation of paying the salaries of the clerk, deputy clerk and other employees of such magistrate, that all fees so charged by such clerk or magistrate, pursuant to Section 483.610, shall be paid into the County Treasury as provided by Section 483.620.

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"The question has arisen as to whether or not the County is liable for the payment of such salaries and is entitled to the fees so charged since for the first time a magistrate for this district will be elected instead of being an appointed officer.

"I shall appreciate hearing from you in this respect."

The "additional magistrate" referred to in your letter is one whose office has been created pursuant to the provisions of Section 18, Article V, Constitution of Missouri 1945, and statutes enacted to implement such constitutional provision.

Subsequent to the creation of such "additional magistrate" courts and the original filling of such office by appointment of the Governor, the office is thereafter to be filled by an election of the people. The term of such officer is thereafter coincident with the terms of other magistrates in the same county. We direct your attention to the following portion of Section 482.010 RSMo 1949:

"* * * Such additional magistrates shall be appointed by the governor when authorized by proper order of the circuit court certified to him, and such appointee shall hold office until the next general election at which election a successor shall be elected to hold office for the unexpired term or full term as the case may be, said terms to be identical with that of other magistrates."

With respect to the salary of an "additional magistrate" whose office has been created under the constitutional and statutory provisions referred to, we find the following portion of Section 482.150 RSMo Cum. Supp. 1953 to be germane to your inquiry:

"1. The salaries of all magistrates shall be paid by the state, except that the state shall not pay the salaries of additional magistrates whose offices are created by order of the circuit court as provided for in article V, section 18 of the constitution; but the districts assigned to such additional magistrates shall be designated

Honorable Hilary A. Bush

as 'additional magistrate districts' and the salaries of such magistrates shall be paid by the county. * * * (Emphasis ours.)

We also find the following portion of Section 483.490 RSMo Cum. Supp. 1953 to be pertinent to that phase of your inquiry directed to the payment of the salaries of clerks, deputy clerks and employees of such "additional magistrates":

"1. Salaries of clerks, deputy clerks and employees provided for in section 483.485 shall be paid by the state within the limits herein provided upon requisition filed by the judge of the magistrate court; except that the salaries of clerks, deputy clerks and employees of additional magistrates whose offices are created by order of the circuit court as provided in section 482.010, RSMo 1949, shall be paid by the county as the salaries of such magistrates are required to be paid. * * * (Emphasis ours.)

Bearing upon the question of the disposition of fees charged and collected in such "additional magistrate" courts, we direct your attention to paragraph 1 of Section 483.620 RSMo 1949, which reads as follows:

"1. In all cases where additional magistrates are selected to fill offices created by order of the circuit court as provided in section 482.010, RSMo 1949, it shall be the duty of the clerk of each such magistrate court, with the approval of the magistrate to charge upon behalf of the county every fee that accrues in his office and to receive the same, and at the end of each month pay over to the county treasurer all moneys collected by him as fees taking from said treasurer two receipts therefor, one of which he shall immediately file with the county clerk, and at the end of each month such magistrate shall make out an itemized and accurate list of all fees collected by him, or by the magistrate, giving the name of the person or persons paying the same, and turn the same over to the county treasurer."

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And to paragraph 3 of the same section, which reads:

"3. All magistrate fees received by the county treasurer shall be deposited by him in a special fund to be denominated 'additional magistrate fund,' and withdrawals may be made during the current fiscal year only for the payment of salary of additional magistrate and clerks, deputy clerks and employees of such additional magistrate. The balance, if any, remaining in said fund at the end of the year may be transferred to the general revenue fund of the county."

It seems obvious to us that the foregoing constitutional and statutory provisions have established a scheme through which the number of magistrate courts in any county may be increased when an apparent need therefor exists and such is shown to the appropriate circuit court. Such offices of "additional magistrates" are not thought to be temporary in nature, but as appears from the language incorporated in Section 482.010 RSMo 1949, are to be established only when it is made to appear to such circuit court that the need is "permanent." It also appears that what is done by the circuit court is the creation of an entirely new office within the county, whose first incumbent is appointed, but whose successors are thereafter elected at the same elections at which other magistrates in the county are elected. Nothing appears in any of the statutes relating either to the salaries of the magistrates and other court officials, nor with respect to the fees collected in such counties, which indicates any change in the mode of payment thereof with respect to whether or not the incumbent magistrate has been "appointed" or "elected." On the contrary, we observe in Section 483.620 RSMo 1949, which deals specifically with such "additional magistrates" the use of the word "selected" with reference to incumbents in such offices. This, of course, is broader than either "appointed" or "elected" and is equally applicable to persons whose incumbency stems from either source.

CONCLUSION

In the premises, we are of the opinion that the salaries of "additional magistrates" whose offices have been created by appropriate circuit courts pursuant to constitutional and statutory authorization, and clerks, deputy clerks and other employees of such "additional magistrates" are to be paid by the counties wherein such courts are located, and that without

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regard to whether the incumbent in such newly created office has been "appointed" or "elected" thereto.

We are further of the opinion that the fees collected in the courts of such "additional magistrates" are to be deposited with the county treasurer and by such officer held in a separate fund to be denominated the "additional magistrate fund" to be used solely for the payment of such salaries, and the excess therein, if any, at the end of any fiscal year, may be disposed of by transferring the same to the general revenue fund of such counties.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

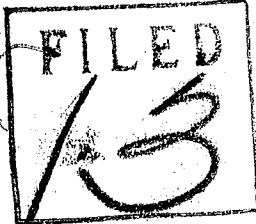
Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

TRAFFIC ORDERS OF
JACKSON COUNTY:

The County Court of Jackson County has exceeded its authority, and Section 6 of Article XII is without foundation in statute or constitution, and since the County Court exceeded its jurisdiction, such provision is null and void.



October 5, 1954

Honorable Hilary A. Bush
Office of County Counselor
Suite 202 Courthouse
Kansas City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"The County Court of Jackson County has requested that I ask your official opinion concerning the following question:

"Jackson County, Missouri, pursuant to the provisions of Section 304.130 R.S.Mo. '49, adopted a Traffic Order for the unincorporated territory of Jackson County, Missouri, a copy of which is enclosed for your information.

"Article III of that Order provides for a Traffic Administrator to be known as Traffic Commissioner. The provisions of Article XII relate to the method of enforcing the Order and provides generally two methods: (1) the arresting officer can make an arrest and proceed with charges in the Magistrate Court as in other violations of a misdemeanor, and (2) under the provisions of Section 6, Article XII, a procedure is set up whereby the arresting officer gives the violator notice to appeal before the Traffic Commissioner.

"It is contemplated in said Order that if the prescribed penalty is paid to the Traffic Commissioner no further action shall be taken, but if such penalty is not paid, then the Traffic Commissioner shall file charges and the matter shall be prosecuted in the Magistrate Court as for other misdemeanors. This follows generally the procedure followed by the Traffic Bureau of Kansas City, Missouri.

Honorable Hilary A. Bush

"The Sheriff of Jackson County has taken the position that the procedure under Section 6, Article XII is illegal and has indicated that he will not follow such procedure prior to an opinion from your office holding it legal.

"The County Court would, therefore, appreciate your opinion in this matter."

It is our thought that the action of the Legislature, Section 304.130 RSMo 1949, does not in any way authorize the action that Jackson County has taken under said Section 6, Article XII of the Traffic Code. The statute provides that the County Court may adopt by order or ordinance "regulations to control vehicular traffic upon public roads and highways," and "establish reasonable speed regulations in congested areas." This is all that the County Court is authorized to do. Nowhere is the County Court authorized to set up its own system of courts or to provide its own machinery for the enforcement of these traffic orders.

Section 6 provides that one who receives a traffic ticket for violation of any of the provisions of this traffic order is ordered "to be and appear before the Traffic Violation Bureau within seven days thereafter to answer to the charge against him." Further, Section 7 of Article XII provides that one receiving a ticket "may appeal to any Magistrate Court in this county from any action or decision of the Traffic Commissioner."

In addition to the fines provided, Section 8 of Article XII provides for the assessment of \$2.00 costs against each violator. It is submitted that the authority contained in Section 304.130 RSMo 1949 in no way authorizes the establishment of the Traffic Violation Bureau under the direction of the Traffic Commissioner, which is apparently to pass upon the charge against the motorist since Section 6 provides that the motorist shall appear before the Traffic Violation Bureau to answer to the charge against him. Likewise, it appears that the Traffic Commissioner is to make some decisions or otherwise act as a court since Section 7 provides for an appeal from such action to a Magistrate Court. Not only is such action in establishing a court unauthorized by the Legislature, but it is certain the Legislature did not and doubtful if it could authorize the county to confer appellate jurisdiction upon Magistrate Courts since said courts are established by the Constitution of Missouri and are made courts of record and their jurisdiction is established by the Legislature.

Further, Section 304.140 RSMo 1949 provides that any violation of traffic regulations enacted pursuant to the provisions of

Honorable Hilary A. Bush

Section 304.130 is a misdemeanor. Thus the Legislature has provided for the punishment to be inflicted for violation of such traffic regulations and the county court is without authority to change such punishment. In this connection, it should be noticed that Section 304.570 RSMo 1949 provides that for any violation of any of the provisions of this chapter, for which no specific punishment is provided, that the violators may be punished by a fine of not less than \$5.00 and not more than \$500.00, or by imprisonment in the county jail for a period not to exceed two years, or by both such fine and imprisonment. Thus the Legislature has set the punishment and provided the degree of the crime for violation of such traffic regulations, and the county court is totally without authority to arrogate unto itself the fixing of penalties for violation of such traffic regulations to be enforced by the Traffic Violation Bureau. The County Court has presumed to take upon itself this authority by enacting Schedule XI of Article XIII, wherein a schedule of fines for many and various offenses is set out ranging from \$1.50 to \$5.00. They have further provided in Section 9 of Article XII that fines for a second offense shall be double the amount set out in said Schedule XI, and fine for a third offense shall be triple the amount set out in said Schedule. They then have further presumed to provide that those guilty of additional offenses shall be tried before a Magistrate Court when it appears that, from the enactment of the Legislature, any violation of these traffic regulations is declared by statute to be a misdemeanor which should be prosecuted before a Magistrate Court.

CONCLUSION

It is therefore the opinion of this office that the County Court of Jackson County has exceeded its authority, and that Section 6 of Article XIII of the Traffic Order for the unincorporated territory of Jackson County, Missouri, is without foundation in statute or constitution, and that since the County Court exceeded its jurisdiction, such provision is null and void.

Very truly yours,

JOHN M. DALTON
Attorney General

TAXATION and REVENUE:)
DELINQUENT TAXES:)
COUNTY COURTS:) County Court authorized to sell land
purchased by county trustee at delinquent
tax sale for consideration greater than
amount of delinquent taxes.

FILED

13

October 22, 1954

Hon. N. Elmer Butler
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Mr. Butler:

We render herewith our opinion based upon your request of
September 28, 1954, which request reads as follows:

"Please furnish me with your opinion concerning
Section 140.260 and subsequent sections, Revised
Statutes of Missouri, 1949.

"I desire specifically your opinion concerning
the sale of land which has been purchased by a
trustee by order of the court to protect taxes
due and owing.

"Can the court legally sell this land to a
person other than the original owner for more
than the taxes due and owing? If so, what
should be done with the amount received in
excess of the taxes due?"

The statute to which you refer, Section 140.260 RSMo 1949,
reads as follows:

"1. It shall be lawful for the county court of
any county, and the comptroller, mayor and
president of the board of assessors of the city
of St. Louis, to designate and appoint a suitable
person or persons with discretionary authority to
bid at all sales to which section 140.250 is
applicable, and to purchase at such sales all lands
or lots necessary to protect all taxes due and
owing and prevent their loss to the taxing authori-
ties involved from inadequate bids.

Hon. N. Elmer Butler

"2. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold.

"3. Such person or persons so designated shall not be required to pay the amount bid on any such purchase but the collector's deed issuing on such purchase shall recite the delinquent taxes for which said lands or lots were sold, the amount due each respective taxing authority involved, and that the grantees in such deed or deeds holds title as trustee for the use and benefit of the fund or funds entitled to the payment of the taxes for which said lands or lots were sold.

"4. The costs of all collector's deeds, the recording of same and the advertisement of such lands or lots, shall be paid out of the county treasury in the respective counties and such fund as may be designated therefor by the authorities of the city of St. Louis.

"5. All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon order of the county court of the respective counties and the comptroller, mayor and president of the board of assessors of the city of St. Louis, and the proceeds of such sales shall be applied, first to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of.

"6. Upon appointment of any such person or persons to act as trustee as herein designated a certified copy of the order making such appointment shall be delivered to the collector, and if such authority be revoked a certified copy of the revoking order shall also be delivered to the collector.

Hon. N. Elmer Butler

"7. Compensation to trustees as herein designated shall be payable solely from proceeds derived from the sale of lands purchased by them as such trustees and shall be fixed by the authorities herein designated, but not in excess of ten per cent of the price for which any such lands and lots are sold by the trustees, provided further, that if at any such sale any person bid a sufficient amount to pay in full all delinquent taxes, penalties, interest and costs, then the trustees herein designated shall be without authority to further bid on any such land or lots."

The first question is whether land purchased by a trustee under the provisions of this section can be sold for more than the taxes due and owing thereon. In our view, it would make no difference whether the sale were made to the original owner or to some other person, there being no period of redemption under Section 140.250, RSMo 1949. In either case, we believe that the court may order the land sold for as much as can be obtained therefor, whether that sum be more or less than the amount of delinquent taxes.

Your next question is what disposition is to be made of the amount received in excess of the delinquent taxes, should there be such an excess. This question is answered by subsection 5 of the above quoted statute as follows:

" * * * * the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of."

This may result in the receipt by the funds of an amount greater than the taxes originally owing. However, that does not indicate any legislative intention that some other disposition should be made of the excess. We conclude that the entire proceeds of the sale, whether they be more or less than the amount of the taxes, should be distributed in accordance with the statutory plan.

Hon. N. Elmer Butler

CONCLUSION

It is the opinion of this office that:

1) Land purchased by a trustee at a tax sale under the provisions of Section 140.260 RSMo 1949 may be sold for a sum in excess of the amount of delinquent taxes owing thereon; and

2) The entire proceeds of such sale should be applied first to the payment of the costs incurred and advanced, and the balance should be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of.

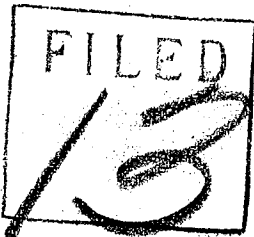
The foregoing opinion, which I hereby approve, was written by my Assistant, Don W. Kennedy.

Yours very truly

JOHN M. DALTON
ATTORNEY GENERAL

DWK:A

COUNTY COURT: In counties of first class it requires one public hearing before any amendment to regulations or zoning order can become effective.



November 5, 1954

Honorable Hilary A. Bush
County Counselor
Jackson County
Kansas City, Missouri

Attention: Mr. Louis Wagner, Assistant County Counsel

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads in part:

" * * * Please advise which of the afore-said sections apply to the following:

"(1) Amendment of the Zoning Order, which if adopted would affect each township in the county.

"(2) Re-zoning - a change of one use of property to another.

"Much of the confusion has been brought about by Section 64.140 since it provides that any amendment of the Zoning Order shall not be adopted until public hearing be held, while on the other hand Section 64.110 provides that a public hearing be held in each township affected by the proposed amendment.

"We shall appreciate your opinion and clarification of these sections as to procedure of hearings on the change in the regulations and changes in the zoning in the unincorporated area."

Honorable Hilary A. Bush

Section 64.040, Revised Statutes of Missouri, 1949, provides the county planning commission shall have the power to adopt a master plan with power to amend or extend said plan or portion thereof. However, before either can be done they have to hold at least one public hearing, notice of which shall be published in one newspaper having general circulation in the county, and notice of such hearing shall be published fifteen days in advance in at least four conspicuous places in each township.

The other two sections to be construed are Sections 64.110 and 64.140, Revised Statutes of Missouri, which read:

"64.110. Further regulation of districts --hearing--order (class one counties). -- The county court shall provide for the manner in which such regulations, restrictions and boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed within the unincorporated territory. In order to avail itself of the powers conferred by sections 64.010 to 64.160, the county court shall request the county planning commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. If there be no county planning commission the county court shall appoint a county zoning commission whose personnel, length of terms and organization shall be same as provided in sections 64.010 to 64.040 for a county planning commission. Such commission shall make a preliminary report and a proposed zoning order and shall hold public hearings thereon and shall afford persons interested an opportunity to be heard. A hearing shall be held in each township affected by the terms of such proposed order, public notice of which hearing shall be given in the same manner as provided for the hearing in section 64.040. Such notice shall state the time and place of the hearing and the place where copies of the proposed report and order will be accessible for examination by interested parties. Such hearings may be adjourned from time to time. Within ninety days after the final adjournment of such hearings the commission shall make a report and submit a proposed order to the county

Honorable Hilary A. Bush

court. The county court may enact the order with or without change or may refer it back to the commission for further consideration. In case a written protest against the proposed zoning of any land lying within one and one-half miles of the limits of any municipality having a zoning ordinance is received from the city council or board of trustees thereof, the county court shall not enact the proposed zoning of such land except by a record vote and after a statement of the reasons for such action shall be spread upon its minutes. In the preparation of its report and proposed zoning order the commission may incur such expenditures as shall be authorized by the county court.

"64.140. Amendment of regulations--protests. --The regulations imposed and the districts created under authority of sections 64.010 to 64.160 may be amended from time to time by the county court by order after the order establishing the same has gone into effect, but no such amendment shall be made without a hearing before the county planning commission; or if there be no county planning commission, such hearing shall be held by the county zoning commission. Such hearing shall be held in any one place in the county designated by the planning or zoning commission regardless of the location of the land affected by such amendment or amendments. Public notice of such hearing shall be given by at least one publication in one newspaper published in said county at least fifteen days before the date of said hearing. In case of written protest against any proposed amendment, signed and acknowledged by the owners of twenty per cent of the frontage within one thousand feet to the right or left of the frontage proposed to be changed, or by the owners of twenty per cent of the frontage directly opposite, or directly in the rear of the frontage proposed to be altered, or in cases where the land affected lies within one and one-half miles of the limits of municipality, by the city council or zoning board of any such municipality, filed with the county clerk, such amendment may not be passed except by the favorable vote of all members of the county court."

Honorable Hilary A. Bush

At first blush the latter two sections are somewhat ambiguous as to the requirement relative to the number of public hearings to be held in amending or changing regulations and zoning orders. Section 64.110, supra, provides for original determination as to regulations, restrictions and boundaries of districts and further provides where such districts are created hearings shall be held in each township to be effected by the order of the county planning commission or county zoning commission as the case may be. While said provision further provides that from time to time said regulations, restrictions and boundaries may be amended, supplemented or changed within unincorporated territory, we believe that it primarily deals with the original creation of such districts and setting up the organization. To the contrary, Section 64.140 deals specifically with amendment and the procedure to be followed in adopting such amendments. It only requires one public hearing.

In construing conflicting statutes relating to the same subject matter, the rule is that they must be construed so as to give effect to both, if possible. *State ex rel. R. Newton McDowell, Inc., v. Smith*, 67 S.W. 2d 50, 334 Mo. 653; *Re: Free v. Board of Trustees of Firemen's Retirement System of City of St. Louis*, 257 S.W. 2d 685, 363 Mo. 1131; *Fleming v. Moore Bros. Realty Company*, 251 S.W. 2d 8. Another well-established rule of statutory construction which unquestionably is applicable in construing the foregoing statutes is that where one statute applies specifically to a particular subject, clearly including a matter in question, and another, general and such that, if standing alone, would include the same matter, the former must be taken as an exception, if not the repeal of the latter; and especially is this true where the special statute was enacted subsequent thereto. *Gilkeson v. Missouri Pacific Railway Company*, 121 S.W. 138, 222 Mo. 173; *Bauer v. Rutter*, 256 S.W. 2d 294, 1.c. 296.

Applying the foregoing rules of construction, since Sections 64.110 and 64.140 do relate to the same subject matter the former dealing principally with the original creation of said district and the latter specifically relating to amendments to regulations imposed and districts created under said chapter, we believe that the provisions of the latter section apply to any amendments to such regulations and zoning order.

CONCLUSION

Therefore, it is the opinion of this department that any

Honorable Hilary A. Bush

amendment or change of regulation or zoning order in a county of the first class may not become effective until one hearing has been held in the place designated in the county by the planning or zoning commission as the case may be and as provided in Section 64.140, Revised Statutes of Missouri, 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

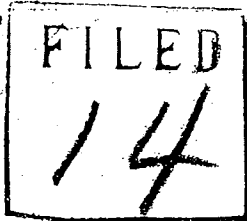
Yours very truly,

JOHN M. DALTON
Attorney General

ARH:vlw

COUNTY COLLECTORS' FEES: (
TAXATION:)
RAILROAD TAXATION: (

Taxes on bridge, express and public utility companies are to be included under the provision of Section 52.260 RSMo 1949, for the purpose of determining collectors' commissions. Railroad taxes are not to be included. Collectors' may not retain commission for collection of railroad taxes if the maximum compensation allowed them under Section 52.270 RSMo 1949 is exceeded by their addition. (



January 14, 1954

Hon. Ray J. Campbell
Collector of Revenue
Pemiscot County
Caruthersville, Missouri

Dear Mr. Campbell:

You have made the following opinion request of this office:

"Since the totals of railroad and utility taxes are not included in arriving at the percentage rate of commissions which the collector is allowed to retain under the provisions of Sections 52.260 and 52.270, RSMo. 1949, and the fee for collecting said taxes is prescribed by a separate section, 151.280, RSMo 1949, should not the county collector be allowed to retain the 1% therein allowed in addition to the total amount prescribed by Sections 52.260 and 52.270."

The first premise of this question is posed by the use of the word "if" in the question asked. This matter has been given serious consideration by this office.

The question as to whether railroad taxes are to be taken into consideration under the provisions of Section 52.260 RSMo 1949 has again been reconsidered and reviewed by this office. Our opinion is in agreement with the conclusion reached in the two opinions which we have previously adopted by letter to Honorable Haskell Holman, May 13, 1953, in regard this subject.

The first of those opinions was the opinion of J. E. Taylor, then Assistant Attorney General, to Lewis A. Duval, dated August 21, 1935. The conclusion of that opinion was as follows:

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"It is the opinion of this department that corporation franchise tax and the railroad tax assessed under the provisions of Article XIII, Chapter 59, R. S. Mo. 1929, should not be included in the amount of taxes assessed and levied for the purpose of determining the collector's commission under the provisions of Section 9935, Laws of Mo., 1933, page 454."

The reason for the conclusion in the Duval opinion was that since collector's commission is fixed by law as now found in Section 151.280, it was evident that the Legislature did not intend that the amount of taxes assessed and levied against a railroad should be included in the amount of taxes assessed and levied for the purpose of determining the collector's commission.

The second opinion of the two opinions referred to in the letter mentioned above was an opinion to A. A. Willard, Collector of Revenue, of Dallas County, dated June 7, 1937. The conclusion of that opinion was that under Section 9935, Laws of Missouri 1933, page 454, only taxes that are to be collected by the collector are to be included in the classification which determines the percent the collector is to receive. It was further concluded that the county collector was required to collect special road district taxes and those taxes were to be included in the classification to determine the collector's percent. This opinion made no reference to railroad taxes as such. It did, however, refer to and include a copy of the above opinion to Lewis A. Duval, August 21, 1935.

A subsequent opinion was given by J. E. Taylor to R. W. Starling, May 14, 1936, in which the conclusion in regard to "locally assessed utilities" is as follows:

"It is, therefore, the opinion of this Department that the taxes locally assessed against electric power and light companies are to be included in the total amount of taxes locally assessed and levied for the purpose of determining the commission which the county collector receives for collecting said revenue."

After quoting from State v. Gehner, 286 S. W. 117, 100 C. 119, in regard to the "distributable property" and "nondistributable property" it is said on page 6 of that opinion:

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"In view of the above, and the practice followed in this State by the State Tax Commission for many years, there can be no doubt that the distributable property owned by telegraph, telephone, electric power and light companies, electric transmission lines, are to be assessed by the State Tax Commission and that the remainder or nondistributable property is locally assessed. It was so held in the case of State v. Baker, 293 S.W. 399.

"This Department, in an opinion given to Lewis A. Duval, Prosecuting Attorney Macon County, Missouri, under date of August 21, 1935, held that the amount of taxes assessed and levied against a railroad should not be included in the amount of taxes assessed and levied for the purpose of determining the collector's commission under Section 9935, supra. The reason for so holding, however, was that Section 10044, Revised Statutes Missouri 1929, provides a special commission for the collector in collecting the railroad taxes. While taxes on property of telegraph, telephone and electric power and light companies are assessed and collected in the same manner as taxes on railroad property, there is no special statute allowing the county collector a special commission for the collection of these taxes."

We believe that this opinion gave service to the long established method of computation of the compensation of county collectors and since the Railroad statute, Section 151.280 was first enacted in its present form in 1879⁽¹⁾ and the method of the computation of the collector's maximum commission in 1877⁽²⁾ there is additional reason given in the adoption of the reasoning of those two opinions. The basic principle seeming to be that the amount of the railroad commissions are fixed and established at one percent (1%) and the percentages in the collector's compensation law vary from ten percent (10%) in Subdivision 1 of Section 52.260 to one-half of one percent is the maximum classification under Subdivision 14.

It should be here considered that the courts would be reluctant to overturn a long established principle of the auditors of this State requiring the accountability of commissions on railroad taxes, under the rule in State ex rel. Barrett v. First National Bank of St. Louis, Missouri, 249 S. W. 619, 297 Mo. 397, 1. e. 410 as follows:

(1) Laws 1879, Page 95.

(2) Laws 1877, Page 253-254

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"In addition, it is a well established rule of construction that a long-continued interpretation of a statute by public officers charged with the execution, while not controlling upon the courts, is entitled to special consideration. * * * * *

It can only be concluded from the foregoing that the compensation of collectors for their services in collecting the revenue is provided for by Sections 52.260 and 52.270 RSMo 1949. Section 52.270 establishes the maximum amounts the Legislature intended for them to be paid.

The utility taxes are also included in the question raised by your opinion request. The inclusion of those taxes should be considered here. In the above mentioned opinion to R. W. Starling, it was said that taxes locally assessed against an electric power and light company were to be included in the matter of taxes locally assessed for the purpose of determining the collectors' commissions. This followed the reasoning of the Duvall opinion that there was a separate section of the law providing for the amount of the collectors' commission for collecting the railroad taxes. The words "utility taxes" are used to designate bridge, express and public utility company taxes as provided now in Chapter 153 RSMo 1949. Those words are so used for the purpose of this opinion. The Duvall opinion in regard to electric power and light companies (utilities), states that there is no special statute allowing the county collector a special commission for the collection of those taxes.

That opinion concludes that locally assessed taxes on the electric power and light companies are to be included in the total amount of taxes locally assessed and levied for the purpose of determining the commissions which the county collector receives for collecting therevenue. If the so-called locally assessed utility taxes are so construed then in what characteristic will the utility taxes assessed by the State Tax Commission fall? If utility company taxes not locally assessed are not to be included with railroad taxes is there a commission otherwise provided for, for their collection? We do not believe that they can be classified as railroad taxes, and the commission for collection paid under Section 151.280, RSMo 1949, as Subsection 2 of Section 153.030 RSMo 1949, provides in regard to the method of collection as follows:

"2. And taxes levied thereon shall be levied and collected in the manner as is now or may

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hereafter be provided by law for the taxation of railroad property in this state, and county courts, county boards of equalization and the state tax commission have or may hereafter be empowered with, in assessing, equalizing and adjusting the taxes on railroad property
* * * * *

That is the method of collection. The above section cannot be said to include the collectors' commission for collecting utility taxes in our opinion.

Local taxes and taxes locally assessed have been discussed in many court opinions on this subject of taxation. The use of the word local undoubtedly arises from the inclusion of Subsection 1 into each succeeding subsection of Section 52.260, supra, and particularly the words "local taxes" in the following quote:

"(1) In each county in this state wherein the whole state, county, bridge, road school and all other local taxes, including merchants' and dramshop licenses, assessed and levied for any one year amount to five thousand dollars or less, a commission of ten per cent on the amount collected;"

(Underscoring ours)

It is believed that it would be giving the word "local" a double meaning to interpret it as applying to and modifying the following phrase: "assessed and levied for any one year." The true meaning should be, we feel, either taxes in the county or taxes of the county. The word local merely is restricting the meaning definitely to county taxes. This would exclude, Franchise Tax, Sales Tax, Income Tax and other State tax, but would apply to a tax computed on a State levy and allocated to the various counties. To say that the word local modifies the word taxes in the first phrase and the words "assessed and levied" the second phrase removed in the above paragraph is a somewhat forced interpretation.

If the utility tax is not merged with the railroad tax then it must be accounted for. It must be accounted for in some wise to provide for a fee for its collection. It is surely conceded that the Legislature intended for the collector to be paid something for collecting the utility taxes. The conclusion must therefore be reached that the collectors' should include the utility taxes in the calculation of the collectors' commissions under Section 52.260 RSMo 1949 to arrive at the percentage rate of collection.

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Since the opinion of this office must then be that Railroad taxes are not to be included in arriving at the percentage rate which the collector is allowed to retain, and that "utility" taxes are included then the question remains as to whether or not the collector is allowed to retain the one percent (1%) allowed by Section 141.280 RSMo 1949, in addition to the total or maximum provided by Section 52.270.

It is a well established principle in this State that the payment of a public officer for services must be definitely provided for by law. In the matter of Nodaway County v. Kidder, 129 S.W. (2d) 857, 1.c., 860, this rule was affirmatively reiterated as follows:

"(8) It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

The statutes in regard to the compensation of county collectors are Sections 52.260 and 52.270 RSMo 1949. We here quote from Section 52.260 in pertinent portions as follows:

"The collector, except in counties where the collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more:

"(1) In each county in this state wherein the whole state, county, bridge, road, school and all other local taxes, including merchants' and dramshop licenses, assessed and levied for any one year amount to five thousand dollars or less, a commission of ten per cent on the amount collected;"

and it is further set out in Subdivision 14 as follows:

" * * * * All fees, commissions or other compensations heretofore charged, received or allowed by or to any such collector, as compensation for his services, whether

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under or by virtue of state law or not, are hereby abolished; and such collector and all his deputies and employees are hereby forbidden under penalty of forfeiture of office, to collect, charge or receive, directly or indirectly, any fees or commissions in the nature of compensation, or other compensation other than those allowed and authorized by this section (11106)."

It will be noted that this last quotation is contained in the subdivision relating to counties in which "all such taxes and licenses levied for any one year exceed Two-Million Dollars." However, the last words of the quotation are "authorized by this section" which words would seem to imply a limitation to the section and add an additional impetus to the phrase in the opening statement "the following commissions and no more."

Section 151.280, RSMo 1949, the Railroad Commission section previously mentioned as contained in the Laws of 1879 is as follows:

"151.280. Fees allowed county collector.--
The county collector shall be allowed for collecting the railroad taxes, payable out of the same, one percent on all sums paid without seizure of personal property; * * *."

The above laws have been interpreted since their enactment by the courts of this State. A thorough search has failed to find, however, any court decision in regard to the question as to whether commissions on railroad taxes are to be allowed to a collector in addition to the amount allowed to him under the provisions of Sections 52.260 and 52.270 mentioned supra.

In the matter of State ex rel. Hawkins 169 Mo. 615 the Supreme Court considered the initial phrase which allowed the collector as full compensation for his services, certain commissions. This was in regard to the question as to whether or not the collectors would be allowed to retain additional commission upon "back taxes". In the last paragraphs at l. c. 621 the court said as follows:

"We think the circuit court correctly ruled that the commissions allowed by section 9260, Revised Statutes 1899, should be full compensation for collecting all taxes, except back taxes, and as to the latter they should receive the extra fees which their extra labors and duties imposed upon them.

"The judgment is affirmed. All concur."

It is believed that the words used in Section 52.260 RSMo 1949 are

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definite and certain. That the last quotation of Subdivision 14 of Section 52.260, supra, "other than those allowed and authorized by this section" applies to Section 52.260 in its entirety.

It is also to be considered that if the Legislature had intended for the collectors of revenue to retain commissions on railroad taxes in addition to the maximum allowed by Section 52.270, it would have provided as was done in Section 52.250 RSMo 1949 as follows:

" * * * * Said compensation shall be exclusive of and unaccountable in the maximum commissions now provided in sections 52.260 to 52.280."

CONCLUSION

It is therefore the opinion of this office that public utility company taxes are to be included in the total amount of taxes assessed and levied for the purpose of determining the commission which the county collector receives for collecting the revenue under the provisions of Section 52.260 RSMo 1949.

It is further the opinion of this office that railroad taxes are not included in the amount of taxes assessed and levied for the purpose of determining the collectors' commissions under Section 52.260, supra.

It is further the opinion of this office that county collectors may not retain commissions collected under the provisions of Section 52.280, RSMo 1949, in addition to the maximum amounts allowed them for their compensation by Section 52.270, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James W. Faris.

Yours very truly

JOHN M. DALTON
ATTORNEY GENERAL

JWF:A

FEES AND SALARIES: 1. The \$750.00 increase in annual compensation for
MARRIAGE LICENSES: recorders of deeds of third class counties where-
MORTGAGES: in the office of recorder of deeds and circuit
PUBLIC OFFICERS: clerk are separate, provided by Senate Bill No. 42,
RECORDER OF DEEDS: 67th General Assembly, shall be prorated for the
year 1953. 2. Such recorders of third class
counties are not entitled to the fee provided by Section 59.490, for
recordation of discharges of veterans after the effective date of said
bill. 3. The basic fee for issuance and recordation of marriage licenses
is \$1.00. The recorder is entitled to 25¢ for each affidavit that is
reasonably necessary in determining the age of the applicants if there
be reasonable doubt that such applicants, or either of them, are under
the legal age for marriage. Further, that if one or both of the appli-
cants are of an age that requires the consent of a parent or guardian,
the recorder is entitled to 50¢ for his certificate and seal that such
consent has been given. 4. Punctuation marks, dollar signs and numerals
are not to be considered "words" in computing recorders' fees under Sec-
tion 59.310, V.A.M.S. 5. The recorder of deeds is not authorized to
satisfy of record a chattel mortgage merely upon the presentation by the
mortgagor of the original note marked paid. Such satisfaction of record
shall be in accordance with Section 443.490.

January 20, 1954

Honorable Cletis J. Capps
Recorder of Deeds
Stoddard County
Bloomfield, Missouri



Dear Sir:

By letter of November 21, 1953, you requested an official
opinion answering five questions you raised concerning the compen-
sation and duties of recorders of deeds in third class counties,
wherein the office of recorder of deeds and circuit clerk are
separate.

All statutory citations are Revised Statutes of Missouri,
1949, unless otherwise noted.

Since four of the five questions you raise deal with com-
pensation of recorders, it may be well to here quote certain
basic principles regarding the compensation of public officials.
The Supreme Court of Missouri in Nodaway County vs. Kidder,
344 Mo. 795, 129 S.W. (2d) 857, 1.c. 860, made this observa-
tion concerning compensation to public officials:

"The general rule is that the rendition of
services by a public officer is deemed to
be gratuitous, unless a compensation there-
for is provided by statute. If the statute
provides compensation in a particular mode
or manner, then the officer is confined to
that manner and is entitled to no other or
further compensation or to any different
mode of securing same. Such statutes, too

Note: Conclusion No. 7 of this opinion has
 been withdrawn. See memo 10/13/60 +
 op. to Parker #29 10/13/60.

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must be strictly construed as against
the officer. * * *

The Kansas City Court of Appeals in Holman vs. City of Macon,
155 Mo. App. 398, 1.c. 402, 403, 137 S.W. 16, stated those
principles in the following manner:

"* * * A recognized rule of statutory construction is that a public officer cannot demand any compensation for his services not specifically allowed by statute and that statutes fixing such compensation must be strictly construed. (State ex rel. v. Patterson, 152 Mo. App. 264, 132 S.W. 1183). * * *

Thus in answering each of your questions concerning compensation we must first determine if there is statutory provision for compensation; and if there be a doubtful statute, that statute must be strictly construed, and compensation denied unless clearly set forth in such statute.

Keeping the above in mind we come now to your question No. 1 which reads as follows:

"Under Senate Bill #42, 67th General Assembly, 3rd Class County Recorder's were granted a \$750.00 yearly raise. Can this whole amount be retained for the year 1953. * * *

Said Senate Bill No. 42 now appearing as Section 59.250 and 59.365, V.A.M.S., 1953, Cumulative Annual Pocket Part reads as follows:

"59.250. Fees, class three counties--accounts and annual report--amount retained--disposition of balance

"1. The recorder of deeds in counties of the third class, wherein there is a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received. He shall make a report thereof each year to the county court.

"2. All other fees over and above the sum of four thousand seven hundred fifty dollars for each year of his official term, seven hundred

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fifty dollars of which shall be compensation for the performance of duties imposed by section 59.365 and four thousand dollars for other duties imposed by law, shall be paid into the county treasury after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary. As amended Laws 1953, p. _____, S.B. No. 42, Sec. 1."

"59.365. Recorder to furnish list of land transfers to assessor

"The recorder of deeds of each county of the third class wherein there is a separate circuit clerk and recorder shall furnish the county assessor of his county, or the township assessors in counties with township organization, on or before the fifteenth day of each month a true and complete list of all real estate transfers completed in such county or townships, in counties with township organization, during the preceding month. The list so furnished shall contain the following information relating to each such transfer:

- (1) The names of the grantor and grantee;
- (2) The consideration paid;
- (3) A brief description of the real estate transferred; and
- (4) The book and page number where each deed is recorded. Laws 1953, p. _____, S.B. No. 42, Sec. 1 (59.365).

Effective 90 days after May 31, 1953, date of adjournment of Legislature."

These two sections became effective ninety days after adjournment of the Missouri Legislature from May 31, 1953. The effective date is thus, August 29, 1953. These two sections prescribe an additional duty for the recorder of deeds, and provide compensation of \$750.00 annually for the performance of this new duty.

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The Constitution of Missouri, 1945, by Article VII, Section 13, prohibits an outright increase of compensation of county officers during their current term of office, as follows:

"Sec. 13. Limitation on increase of compensation and extension of terms of office.
--The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

Therefore, the only theory upon which current recorders are entitled to the \$750.00 annual increase of salary is on the basis that it is compensation for the added duty. The Legislature contemplated \$750.00 as compensation for an entire year of performance of the duty prescribed by Section 59.365. Since that additional duty will be performed only for the portion of 1953, after the effective date of the bill, the increase in salary must be prorated.

Your question No. 2 reads as follows:

"Can separate Recorders in 3rd Class Counties still collect the fees to which they are entitled under Section 59.490, or was this repealed by the passage of Senate Bill #42 referred to above."

Section 59.490 reads as follows:

"List of veterans, class three counties--copies of discharge--fees.--In all counties of the third class wherein the offices of the circuit clerk and recorder of deeds are separate, the recorder of deeds shall, in addition to the duties imposed upon him by law, and by virtue of this chapter, have the additional responsibility to prepare and keep a separate alphabetical list of the names of all residents of the county who have been discharged from the armed forces of the United States, which list shall show such veteran's name, post office address, and the branch of service from which he was discharged, the date of his discharge and the date of the recording of

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same, together with the book and page wherein such discharge is so recorded, which list shall be maintained by the recorder for public inspection and shall be up to date at all times; and in addition thereto, said recorders in the said counties shall have the additional responsibility of furnishing to all persons who have so reported their discharge from the armed forces of the United States one certified copy of such discharge upon request of such veteran, or if such veteran shall have deceased since the recording thereof, then by his heir, executor or administrator. For each name which the recorder shall append to the aforesaid alphabetical list, and for each certified copy of such discharge as he shall furnish, the said recorder shall receive the sum of fifty cents, to be paid out of the county treasury, which fees shall not be deemed to be accountable fees in determining the maximum amount which the recorder may retain as set forth in section 59.250; provided, however, that no such recorder shall be paid for the listing of any nonresident of the county, nor for the listing of any such discharge which has previously been so listed in any county, nor for any additional verified copy after the first. A veteran shall be deemed a resident of the county for the purposes of this section if he shall have resided in the county prior to his induction into the armed forces, and shall have returned there upon his discharge, or if he shall have resided in the county for more than ninety days next prior to the recording of such discharge with the intention of making the county his domicile."

Section 59.250, RSMo 1949, which was repealed by Senate Bill No. 42 specifically exempted from its provisions those fees listed in Section 59.490. However, Senate Bill No. 42 does not so exempt those fees received for recording discharges of veterans. On the contrary, Senate Bill No. 42 says: "All other fees over and above the sum of \$4,750.00 for

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each year." If we are to follow the mandate of the cases cited at the beginning of this opinion, and strictly construe Senate Bill No. 42, we must conclude that said bill in repealing a section which specifically exempted from its provisions those fees received for recording veterans' discharges, but in itself making no mention thereof, leaves no choice but to declare that it was the intention of the Legislature to limit the annual compensation of recorders of this particular class and type of county to an annual compensation of \$4,750.00. Thus the recorder is not entitled to receive from the county treasurer the sum of 50¢ for each recorded discharge.

Your question No. 3 reads as follows:

"What is the total fee, that is allowable for the issuance of marriage licenses."

The recorder is entitled to a fee of \$1.00 for recording a marriage license. This is authorized by Section 451.150, which reads as follows:

"The recorder shall record all marriage licenses issued in a well-bound book kept for that purpose, with the return thereon, for which he shall receive a fee of one dollar, to be paid for by the person obtaining the same."

Section 451.080 prescribes the form of the marriage license as follows:

"1. The recorders of the several counties of this state, and the recorder of the city of St. Louis, shall when applied to by any person legally entitled to a marriage license, issue the same which may be in the following form:

"State of Missouri,)
County of _____,) ss.

This license authorizes any judge, magistrate, licensed or ordained preacher of the gospel, or other person authorized under the laws of this state, to solemnize marriage between A B of _____, county of _____ and state of _____, who is _____ the age of _____

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twenty-one years, and C D of _____, in
the county of _____, state of _____,
who is _____ the age of eighteen years.

"2. If the man is under twenty-one or the
woman under eighteen, add the following:

The father or mother or guardian, as
the case may be, of the said A B or C D
(A B or C D, as the case may require),
has given his or her assent to the said
marriage.

Witness my hand as recorder, with
the seal of office hereto affixed, at my
office, in _____, the _____ day of
_____, 19 _____.

_____, recorder."

The above section requires the certificate of the recorder
and the seal of his office upon the marriage license if
either, or both of the parties to the marriage are under
the ages therein specified. Section 59.310, V.A.M.S. reads
in part as follows:

"Recorders shall be allowed fees for their
services as follows: * * *

"For every certificate and seal50

* * *."

Section 451.090 prohibits issuance of a marriage license
by a recorder to persons under certain designated ages. A duty
is thus imposed upon the recorder to use reasonable care and
diligence in ascertaining the ages of the parties to the marriage
license. There is no statutory provision for the method by
which the ages of doubtful persons may be ascertained. However,
it is reasonable that the recorder may require affidavits from
the parties as to their correct age, when there may be reason-
able doubt as to whether the parties are of sufficient age to
contract marriage.

Section 59.150 authorizes the administration of oaths
by recorders as follows:

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"Hereafter whenever, under any law of this state relating to the duties of the recorder of deeds in any county of this state, it becomes necessary for any person to be sworn to any statement, affidavit or other papers of any kind, the recorder of deeds shall be authorized to administer an oath to any person in matters relating to the duties of his office, with like effect as clerks of courts of record; provided, he use his seal of office to the jurat, as clerks of courts of record do. He shall receive the same compensation allowed by law for like service as clerks of courts are now allowed."

Since no specific fee is authorized for recorders we must look to the fees allowed to clerks of courts of record for administering an oath to an affidavit. By Section 483.540, clerks of circuit courts and courts of common pleas, are allowed 25¢ for oaths and certificates to affidavit, subsection reading in part as follows:

"The clerks of the several circuit courts of this state, and of the courts of common pleas, shall receive in all civil proceedings the following fees for their services:

* * *

"For oath and certificate to affidavit .25
* * *"

In recapitulation then it is concluded that recorders are entitled only to a fee of one dollar for recordation of a marriage license, unless there is reasonable doubt that one or both of the parties to the marriage are not of sufficient age. The recorder may then take such affidavits as are reasonably necessary to ascertain the correct ages of those persons whose age is in doubt, and for each affidavit he may charge a fee of 25¢. If one or both of the parties are of such tender age as to require the consent of their parent or guardian, the recorder is required to make a certificate that such consent has been given and affix his seal thereto. For such certificate and seal the recorder is entitled to a fee of 50¢.

Question No. 4 reads as follows:

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"Recorders are allowed 20 cents per hundred words for recording. What constitutes a word. (Are punctuation marks, dollar signs, numerals, etc. words.)"

This matter has been decided by two previous opinions of this office. Those two opinions, which are enclosed are: Hon. W. E. Freeland, Jefferson City, Missouri, under date of June 3, 1937, Hon. Duffy J. Hudnall, Clerk of the Circuit Court, Scotland County, Memphis, Missouri, under date of May 11, 1935.

Your question No. 5 reads as follows:

"What is the legal procedure in releasing chattel mortgages. (The reason for this question is that one of the small loan companies, who use a continuing type of chattel insist that such chattel cannot be released by the presentation of the original note marked paid, but that the original chattel must be produced)."

Section 443.490 prescribes the methods by which chattel mortgages and deeds of trust may be satisfied as of record.

"1. Such recorder shall enter in a book, to be provided by him for such purpose, the names of all the parties to such instrument, arranging the names of such mortgagors or grantors alphabetically, and shall note thereon the time of filing such instrument or copy, for which said recorder shall receive a fee of twenty cents. Said fee shall also include and cover all costs for discharging said mortgage or deed of trust according to the methods herein provided.

"2. Such mortgage or deed of trust, when satisfied, shall be discharged by any of the following methods:

"(1) By the mortgagee, cestui que trust, his agent or assigns, on the margin of such index, which shall be attested by the recorder;

"(2) Upon the presentation by the mortgagor or grantor of the original mortgage

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or deed of trust, and upon such mortgagor or grantor making affidavit before such recorder that the instrument presented by him is the original of the copy on file, and that such mortgage or deed of trust has been fully paid and satisfied;

"(3) Upon presentation or receipt of an order in writing, signed by the mortgagee or cestui que trust thereof, attested by a magistrate, or any notary public, stating that such instrument has been paid and satisfied.

"3. When any of these provisions have been complied with, it shall be the duty of the recorder to enter in a column for that purpose the word 'satisfied,' giving date. When a chattel mortgage shall be satisfied as above provided, the recorder may deliver said mortgage to the holder of the note secured thereby, or, if the holder of said note refuse to receive the same the recorder may destroy said mortgage; provided, that the recorder may deliver to the parties entitled thereto, or destroy all such mortgages now remaining on file in his office and which have been entered satisfied on the chattel mortgage register." (Emphasis theirs)

A careful examination of the above does not disclose the provision whereby the recorder may satisfy of record a chattel mortgage upon the sole basis of presentation by the mortgagor of an original note marked paid.

CONCLUSION

It is therefore, the opinion of this office that:

1. The \$750.00 increase in annual compensation for recorders of deeds of third class counties wherein the office of recorder of deeds and circuit clerk are separate, provided by Senate Bill No. 42, 67th General Assembly, shall be prorated for the year 1953.

2. Such recorders of third class counties are not entitled to the fee provided by Section 59.490, for recordation of discharges of veterans after the effective date of said bill.

Honorable Cletis J. Capps

3. The basic fee for issuance and recordation of marriage licenses is \$1.00. The recorder is entitled to 25¢ for each affidavit that is reasonably necessary in determining the age of the applicants if there be reasonable doubt that such applicants, or either of them, are under the legal age for marriage. Further, that if one or both of the applicants are of an age that requires the consent of a parent or guardian, the recorder is entitled to 50¢ for his certificate and seal that such consent has been given.

4. Punctuation marks, dollar signs and numerals are not to be considered "words" in computing recorders' fees under Section 59.310, V.A.M.S.

5. The recorder of deeds is not authorized to satisfy of record a chattel mortgage merely upon the presentation by the mortgagor of the original note marked paid. Such satisfaction of record shall be in accordance with Section 443.490.

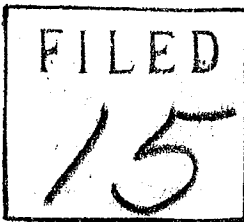
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:vlw

COUNTY OFFICERS:
OUSTER:



The amount of time which a county officer must personally devote to the duties of his office in order not to be subject to ouster from his office is a matter which must be determined upon the basis of the particular facts and circumstances in each case.

May 12, 1954

Honorable John F. Carmody
Prosecuting Attorney
Randolph County
Courthouse
Moberly, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"The County Court of Randolph County, Missouri has directed me to request an official opinion from your office whether absence from the office of the County Treasurer, in a County of this class, for periods of more than short intervals by the incumbent is permitted?

"When I use the term short intervals, I contemplate periods of less than 8 hours."

In a telephone conversation which we had with you soon after receiving your above letter, you informed us that your county treasurer did not have a clerk or deputy, that the treasurer herself was the only person in the office, and that when the treasurer was not personally in the office that the office was closed.

The duties of a county officer in respect to the duties of his office, from the standpoint of personally performing those duties, is set forth in Section 106.220 RSMo 1949, which reads:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act of duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state,

Honorable John F. Carmody

shall thereby forfeit his office, and may be removed therefrom in the manner provided in sections 106.230 to 106.290."

Section 54.100 RSMo 1949, reads:

"The county treasurer shall keep his office at the county seat of the county for which he was elected, and shall attend the same during the usual business hours. The county court shall provide said county treasurer with suitable rooms, and a secure vault in the courthouse or other building occupied by other county officers, and the county treasurer shall keep his office and records in such rooms and vault provided by the county court. He shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court."

The most recent construction by the appellate courts of Section 106.220, supra, and Section 54.100, supra, was in the case of State ex inf. Taylor vs. Cumpston, 240 S.W. (2d) 877, which case was decided by the Missouri Supreme Court in 1951. In it the Attorney General of Missouri filed an action in quo warranto against the county treasurer and ex officio collector of Bates County, to remove that official from office on the ground that he had

"* * * failed to attend to the duties of said office during the usual business hours for the transaction of business therein and failed personally to devote his time to the performance of the duties of such office of County Treasurer and Ex Officio Collector and did and does willfully neglect and refuse to perform the official acts and duties which by law it was his duty to do and perform. * * * that on or about the 14th day of March, 1949, respondent entered into a contract of employment with what is known to relator as Skelly Oil Company,* * * so that on and after April 1, 1949 the performance of his duties thereunder occupied and consumed substantially the entire working time of respondent, including the usual business hours aforesaid,* * *."

At l.c. 879 of its opinion, the court further stated:

"* * * The execution of a contract with Skelly Oil Company was admitted, but respondent denied that his duties under said contract occupied his entire working time. Respondent further denied that he had 'failed, neglected or refused to attend his

Honorable John F. Carmody

said office or to attend to the duties thereof or to personally devote his time to the performance of the duties thereof.' He alleged that 'all of the duties of the County Treasurer and Ex Officio Collector of Bates County, Missouri have been and are now being performed by him personally or under his immediate supervision and direction.'

"In reply to particular allegations in the answer, relator admitted that 'respondent is personally present in charge of said office all day long on Saturday of each week'; and 'that respondent frequently works in said office of County Treasurer before office hours, after office hours and on Sundays and holidays.'"

There was further testimony, which was not contradicted, that this officer at all times employed a deputy who kept the office open during usual business hours, and who promptly and efficiently discharged all the duties of the office. Just how much of his time the officer actually spent in the office was a matter of some dispute and doubt.

In its opinion denying ouster, the court said, in part, at l.c. 885:

"Relator insists that a finding that respondent has forfeited his office should be made, and that an order of ouster be entered. We do not think the words of Sec. 54.100, that 'the county treasurer shall keep his office at the county seat of the county for which he was elected, and shall attend the same during the usual business hours,' and the words of Sec. 106.220 'who shall fail personally to devote his time to the performance of the duties of such office' should be construed to require the actual continuous physical presence of the respondent in his office during the usual business hours or to require respondent to devote his entire time personally during such hours to the actual physical performance of the duties of the office on peril of forfeiture of his office. The sections have not been so construed and we think they should not be so construed. The authorities, however, are very limited.

"In the case of Fairly v. Western Union Telegraph Co., 73 Miss. 6, 18 So. 796, 797 it was held that a constitutional provision that no person shall hold an office of profit 'without personally devoting his time to the performance of the duties thereof' must be given a reasonable construction. The court said: 'if the public

Honorable John F. Carmody

duties of an office require all the time of a public servant, then the whole time must be given. If all the time of the officer be not required for the complete and faithful execution of his trust, then he shall give such time and devote such service as shall suffice for the full and faithful discharge of the duties of his office.' In commenting upon the above case the court, in *Miller v. Walley*, 122 Miss. 521, 84 So. 466, 467, said: '* * * The decision does not hold that the entire time of the superintendent was to be devoted to the public office, but holds that only such time as the duties of the office required for a proper performance must be devoted to the duties of the office. This necessarily presents a latitude for differences and debate as to what time is required as a matter of fact.' In the case of *State v. Hinshaw*, 197 Iowa 1265, 198 N.W. 634, 637, in an action to require the State Fish and Game Warden to account for certain funds, the court said: 'There is no contention here that appellee neglected any of his official duties whatever, nor is there any claim that he misappropriated any of the property of the state. A public officer is not required to give every instant of his time to the public service in such a sense that he cannot, if wholly consistent with public duties, perform any other service or earn money from any other source. His first and paramount duty is to perform all of the requirements of his office, but he is not barred because he holds public office from investing his funds in a legitimate business enterprise, nor prohibited from receiving profits from an independent business in which he may have an interest.'

From the above, it seems to us to be clear that it would be impossible for this department, or for any court, to lay down a flat rule on this matter, and, for example, to say that a county officer could, with impunity, be absent from his office for one hour and forty minutes each day for four days in each week, but that if he were absent for one hour and forty-one minutes each day, four days in each week, he would be subject to custer under Section 106.220, *supra*.

In other words, each particular case must be decided upon the basis of its particular state of facts and circumstances. From the *Cumpton* case it would appear that a county officer does not have to

Honorable John F. Carmody

spend all of the business day in his office, but how much time he must spend there in order to be within the statute is, as we said, a matter for determination in each case.

CONCLUSION

It is the opinion of this department that the amount of time which a county officer must personally devote to the duties of his office in order not to be subject to ouster from his office is a matter which must be determined upon the basis of the particular facts and circumstances in each case.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

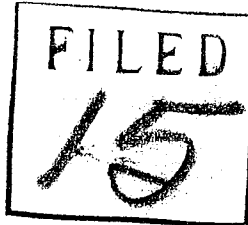
Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

PUBLIC RECORDS:
VETERANS:
STATE SERVICE OFFICER:

State Service Officer entitled to such public records as he needs in connection with his official duties without charge. Copies of such records may be requested by Assistant State Service Officer.



May 24, 1954

Honorable Roy L. Carver
State Service Officer
P.O. Drawer 147
Jefferson City, Missouri

Dear Mr. Carver:

We render herewith our opinion, based upon your request of April 28, 1954, which request reads as follows:

"I am requesting an opinion on the procurement of documents by this Department when such documents are needed to complete claims through the Veterans Administration or other governmental agencies. Such documents as requested by this Department are necessary as proof to the agency concerned. Most of our documents are received from the Recorder of Deeds, Circuit Clerks and Probate Courts of the different counties and many are received from the Bureau of Vital Statistics of the State of Missouri, and all of these documents are furnished without cost when requested by this Department to complete a claim for a veteran. The authorization that we have for this is found in the Missouri Revised Statutes 1949, Volume 1, Chapter 42, Section 42.050. 'Service Officer shall have access to all the pertinent records of state of Missouri, etc.'

* * * * *

"Also, an opinion on the request of such documents - should they be over

Honorable Roy L. Carver:

the signature of the State Service Officer or can he authorize the Assistant State Service Officers to request such documents?"

The first question here, is: How many certified or authenticated copies of public records should the official custodian of such records furnish to the State Service Officer without charge?

The answer to this question depends upon a construction of Chapter 42, RSMo 1949, and particularly Section 42.050, RSMo 1949, which section reads as follows:

"The state service officer shall have access to all the pertinent records of the state of Missouri, its officers and departments, and all subdivisions of the state, as may be of assistance in accomplishing the purposes of this chapter, and upon the written request of the state service officer, the person or persons in charge of such record or records shall furnish to said state service officer, authenticated or certified copies of such record or records as may be designated by said state service officer, without charge."

You will notice that said section does not, nor does any other provision in the chapter, limit the number of certified or authenticated copies which are required to be furnished to the state service officer without charge. We believe that the number of authenticated or certified copies of a given record is within the discretion of the state service officer. Only he can determine how many such copies are required to accomplish the purposes of the chapter. We believe, therefore, that no person in charge of public records, coming within the terms of Section 42.050, supra, may limit the number of certified or authenticated copies of such records which he will furnish to the state service officer without charge.

Your next question is, whether the request for or designation of such records, copies of which are required, must be made by the state service officer personally, or whether assistant state service officers

Honorable Roy L. Carver:

can make the request?

The appointment of assistant state service officers is authorized by Section 42.060, RSMo 1949. The designation of and request for certified copies of public records being a ministerial act, and not judicial or quasi-judicial, the state service officer may authorize his assistants to make such designation and request. Having so been authorized, the request and designation by an assistant state service officer is as effective as if made by the state service officer himself. The rule relating to delegation by an officer of authority to perform a ministerial act is thus stated in 43 Am. Jur., Public Officers, Section 460:

"* * * And while ministerial acts may be delegated by an officer or board to 'assistants' whose employment is authorized, they do not have the status of deputies to whom quasi-judicial functions may be delegated. * * *."

CONCLUSION

1) Under the provisions of Section 42.050, RSMo 1949, a person in charge of public records is required to furnish to the state service officer, without charge, as many authenticated or certified copies of a designated record as the state service officer, in his discretion, may designate and request.

2) An assistant state service officer, duly authorized by the state service officer to designate and request authenticated or certified copies of public records, may designate and request such copies, and such designation and request need not be made by the state service officer personally.

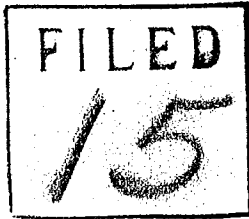
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Don Kennedy.

Yours very truly,

JOHN M. DALTON
Attorney General

WDK:irk

ASSESSMENT OF PERSONAL
PROPERTY IN TOWNSHIP
ORGANIZATION COUNTIES:



In township organization counties personal property should be assessed and taxed in the township where the owner resides, even though the property is physically located in another township; if the property is partnership property it should be assessed against the partnership at the place where located.

July 28, 1954

Honorable John R. Caslavka
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"The Honorable County Court of Dade County, Missouri, has asked you to write this office relative to the assessing and payment of personal property taxes in Dade County, Missouri. The problem is as follows:

"A certain individual owns certain personal property in North township, Dade County, Missouri. He lives in Center Township, Dade County, Missouri, and has refused to allow this personal property to be assessed in Center Township, alleging that the situs of the property is in North Township and they should be assessed in North Township and paid to that township collector instead of in the township where he actually resides. This man also states that this personal property is owned by him and another man in partnership, but his alleged partner was until the 1st day of June, 1954, living in the State of New Mexico and prior to that time had resided in Center Township also. Dade County is under township organization.

"This office would appreciate your opinion as to where the property should be assessed, where the taxes should be paid, and the proper division of the taxes.

"Also assuming for the sake of argument that the property is partnership property and that one of the partners did reside in North Township and the other partner in Center Township, should there be a division of the partnership property so that a part of the taxes

Honorable John R. Caslavka

would be payable in North Township and the balance in Center Township?"

On March 10, 1950, this department rendered an opinion (a copy of which is enclosed) to Honorable W. V. Mayse, Prosecuting Attorney of Harrison County, in which we held that personal property, in a county under township organization, should be assessed in the township in which the owner of such property resides, even though the property itself be located in another township. Thus, if a man lives in Center Township in Dade County and his personal property is located in North Township in Dade County, the property should be assessed in Center Township, and the tax on it should be paid there.

You state that the man living in Center Township claims that the personal property located in North Township is partnership property, and that the other partner lives outside the state of Missouri. You inquire regarding the assessment of this property in the above situation. As we stated above, we believe the law to be that personal property is to be taxed at the domicile of the owner in the situation first stated by you. However, we believe the law to be different in a situation where the personal property is partnership property, in which situation it appears that the property is to be taxed against the partnership in the place where it is located. In this regard we direct attention to the case of School District v. Bowman, 178 Mo. 654. The court there stated, at l.c. 657-658 of its opinion:

"This is an action by the School District of Plattsburg, Clinton county, a body politic under article 2 of chapter 154, Revised Statutes 1899, against the defendant Bowman, on his bond as assessor of taxes for Clinton county, and against the other defendants as the sureties on his bond, to collect, as damages, certain taxes for the year 1900, which it is alleged were lost to the plaintiff, by the act of the assessor in assessing certain tangible personal property, consisting principally of cattle, which was owned by several different partnerships, to the partnerships and in the school districts in the county in which the partnerships respectively did business, and in which the cattle actually were when assessed, instead of assessing to each of the partners his proportionate interest in the partnership property, in the school districts in which each of said partners resided.*

Honorable John R. Caslavka

"All of the property has been assessed to the respective partnerships. The only question is, which school district is entitled to the tax; that in which the partnership does business and in which the property is actually located, or that in which the partners reside; and if the partners reside in different school districts, whether the proportionate interest of each partner in the partnership property should be assessed to each partner in the school district in which each resides?

"The circuit court entered judgment for the defendants and the plaintiff appealed."

In affirming the holding of the trial court, the Missouri Supreme Court said in part, at l.c. 660-661 of its opinion:

"The proposition as to the assessment of partnership property is one of first impression in this court. The plaintiff contends that section 9121, Revised Statutes 1899, requires partnership property to be assessed against the members in proportion to their interest in the firm, and in the county or counties in which such members reside. That section provides: 'All personal property, of whatsoever nature and character, situate in a county other than the one in which the owner resides, shall be assessed in the county where the owner resides; . . . and the owner, in listing, shall specifically state in what county, State or Territory it is situate or held.'

"This section undoubtedly changes the general and original rule, above pointed out, that tangible personal property is assessable and taxable where it is actually located, and makes it assessable where the owner resides. The courts have nothing to do with the wisdom of this change in the rule. The Legislature had power to so prescribe, and the courts must enforce the law.

"But this section does not attempt to change the other rule of law, that the firm, and not its members, is considered the owner of the property, for the purposes of taxation. In fact the Legislature of this State does not appear to have ever considered the question of the assessment and taxation of

Honorable John R. Caslawka

partnership property, and the statute being silent, the general rules of law must be enforced.

"The firm must, therefore, be regarded as the owner of tangible personal property, for the purposes of taxation. The firm being the owner, it follows, even under section 9121, Revised Statutes 1899, that the property must be assessed to the firm where it resides. But it is said that a firm can have no domicile. This is true except for the purpose of taxation, and for such purposes, its place of business is its domicile.

"It seems reasonably clear, however, that the Legislature did not have in mind partnership property when it enacted section 9121, and that that section is properly referable only to property owned by an individual. And this being true, the statute must be deemed to be silent as to the assessment and taxation of partnership property; and, therefore, the general rules of law pointed out must be held to obtain."

We are aware that in the above case the county unit involved is a school district, and that in the instant case it is a township in a township organization county. We believe, however, that the legal principles which we have stated above would be equally applicable in either situation.

In the Kentucky case of Walter G. Hougland and Sons v. McCracken County Board of Supervisors, 206 S.W.(2d) 961, the court at l.c. 953, stated:

"Section 132.220, sub.1, KRS, provides that taxable property shall be listed by the owner in the 'county where it is located.' Since the property of appellants does not remain physically in the state, it would ordinarily be taxable where the owner was domiciled. Appellants argue that the same rule with respect to individuals should apply to partnerships, and that the 'home' of the partnerships is where the partners intended and intend that it shall be. It is, of course, the general rule that in the case of an individual, where a legal domicile is established, it continues at that place until an intention to abandon it is shown. Helm's Trustee v. Commonwealth, 135 Ky. 392, 122 S.W. 196.

Honorable John R. Caslavka

"It is generally recognized, however, that the taxable situs of a partnership's personal property is at the place where it conducts its business. As stated in Cooley on Taxation, (2d) Sec. 473, page 1060:

"Partnership property is taxable as an entity at the domicile of the firm rather than at the residence of the several owners; and the domicile of a partnership, for the purpose of taxation, is at its place of business."

"The same rule is thus expressed in 51 Am. Jur., Taxation, Section 486:

"the interest of a partner in a partnership may be regarded as separate from his person for the purposes of taxation, and as a general rule, in the absence of a controlling statute to the contrary, it seems that such interest is regarded as having its situs at the place where the business of the partnership is carried on."

"It has been decided in this state that partnership property should be assessed as a whole against the partnership at the place where it conducts its business rather than at the places where the partners reside. City of Louisville v. Tatum, Embry & Co., 111 Ky. 747, 64 S.W. 836.

"More recently this principle was recognized in Commonwealth v. Madden's Ex'r, 265 Ky. 684, 97 S.W. 2d. 561, 107 A.L.R. 1379, where we held that the assets of a partnership 'localized' in New York were not taxable in Kentucky where one of the partners resided."

We would also direct attention to Section 110, page 221, of Vol. 84, C.J.S., which reads:

"It is perfectly competent for the state to lay a tax on personal property found within its borders, notwithstanding the owner, a nonresident, is also liable to taxation on the same property in the state of his domicile, and the fact that the property may have escaped taxation in the foreign state of domicile has no bearing on its taxability in the state of the forum."

Honorable John R. Vaslavka

In view of the above, we believe that in the situation stated by you, to-wit, personal property located in North Township of Dade County, owned in partnership by a partner living in Center Township in the same county, and by another person living outside of the state, the personal property should be assessed and taxes paid in North Township, and that the assessment should be against the partnership.

Finally, you suggest a situation where instead of living out of the state, the second partner lives in North Township. For the reasons stated above, we believe that the assessment should be in North Township against the partnership and that the taxes should be paid in North Township.

CONCLUSION

It is the opinion of this department that personal property located in North Township of Dade County, which property is owned by a person living in Center Township of Dade County, should be assessed and taxes thereon paid in Center Township; that if this property is partnership property it should be assessed against the partnership in North Township and taxes thereon paid in North Township, regardless of where the partners or any of them may live.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

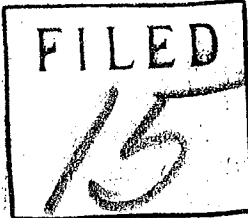
Very truly yours,

JOHN M. DALTON
Attorney General

HPW/lld

enc. (1)

SHERIFFS: Person resident of fourth class county for
PUBLIC OFFICERS: 75 days and of the State of Missouri for two
years immediately prior to appointment is
eligible for appointment as deputy sheriff in
such county.



September 8, 1954

Hon. John R. Gaslavka
Prosecuting Attorney
Dade County
Box 144
Greenfield, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"The Sheriff of Dade County, Missouri, has
asked me to write your office concerning
the qualification of a certain man he is
considering having appointed as Deputy
Sheriff of Dade County, Missouri.

"This individual has lived in the State of
Missouri, for a little over 2 years and
has resided in Dade County, the county in
which he is being considered for Deputy
Sheriff, approximately 75 days.

"Your opinion would be appreciated as to
whether he is qualified to be a Deputy
Sheriff of this county."

According to the classification of counties found in Sec-
tion 48.020 RSMo 1949, Dade County is one of the fourth class.
Examining statutes relative to the office of sheriff in counties
of such class, we find that Section 57.250 makes provision for
such appointment with the approval of the judge of the circuit
court.

We have examined the statutes generally relating to sher-
iffs and fail to find any specifically setting forth the quali-
fications of deputies in fourth class counties. We do find
Section 562.210 which we feel is germane to your inquiry. This
statute reads as follows:

Hon. John R. Caslavka

"Hereafter no sheriff in this state shall appoint any under sheriff or deputy sheriff except the person so appointed shall be, at the time of his appointment, a bona fide resident of the state."

We are led to the belief from the foregoing that the only qualification attached by statute to persons appointed deputy sheriffs is that they be bona fide residents of the State of Missouri.

A somewhat different situation obtains with respect to emergency or special deputies. As bearing upon the appointment of deputies of this class, we direct your attention to Section 57.110 RSMo 1949 reading, in part, as follows:

"* * * In any emergency the sheriff shall appoint sworn deputies, who shall be residents of the county, possessing all the qualifications of sheriff. Such deputies shall serve not exceeding thirty days, and shall possess all the powers and perform all the duties of deputy sheriffs, with like responsibilities, and for their services shall receive two dollars per day, to be paid out of the county treasury."

Also Section 542.190 RSMo 1949, reading as follows:

"That no sheriff of a county, mayor of a city, or other private persons, authorized by law to appoint special deputies, marshals or policemen, in this state, to preserve the public peace, and quell public disturbances, shall hereafter appoint as such special deputies, marshals or policemen, any person who is not a resident of this state, and has been a resident of this state for at least three years prior to his appointment."

As mentioned previously, however, these provisions relate only to emergency or special deputies. The absence of further statutory enactments bearing upon the qualifications of deputy sheriffs in counties of the fourth class indicates a legislative intent that only the requirement established by Section 562.210 RSMo 1949 necessarily must be met.

Hon. John R. Caslavka

CONCLUSION

In the premises, we are of the opinion that a person resident of a county of the fourth class for 75 days and of the State of Missouri for two years immediately prior to appointment, is eligible for the office of deputy sheriff in a county of such class.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

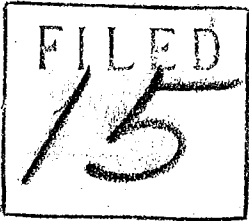
John M. Dalton
Attorney General

WFB/vtl

STATE HOSPITALS FOR THE INSANE:

Payment for confinement of indigent patients.

:A county does not have a lien
:on real estate owned by the
:entirety by inmates of such
:hospital for the payment of
:expense of the confinement
:of such persons in State
:Hospitals for the Insane.
.....



December 1, 1954

Honorable John R. Caslavka
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Mr. Caslavka:

This will comply with your recent request for an opinion from this office, respecting the payment of expenses of confinement of a person of unsound mind in a hospital or other place as directed by the Probate Court of the county involved, and whether the county has a lien against the real estate owned by husband and wife as tenants by the entirety, and if so, how may the lien be enforced. Your request by letter for an opinion on this subject reads as follows:

"Recently the Probate Judge of Dade county, Missouri adjudicated a resident of this county to be of unsound mind and ordered her confined in the hospital in Springfield, Greene county, Missouri, there being no suitable place in Dade county, Missouri, for her confinement, all in accordance with section 458.160, Revised Statutes of Missouri, 1949.

"To further complicate matters this lady (and her husband who has been confined in the mental institution in Nevada, Missouri, for some years) along with her husband own certain real-estate in Everton, Dade county, Missouri, as tenants by the entireties, which has been appraised at \$1,500.00. They have several children, all except one of whom are residents outside of the state of Missouri, and who have evidenced no interest in their parents welfare.

Honorable John R. Caslavka:

"A guardian has been appointed for this lady but there is no personal property to pay the expenses of her confinement until she can be removed to the hospital at Nevada, Missouri.

"Section 458.170, Revised Statutes of Missouri, 1949, indicates that the 'expenses attending such confinement shall be paid by the guardian out of his estate', but upon further checking the insanity laws I find no section or case authority to indicate Dade county, Missouri, has a lien upon this property for the payment of this expense nor anyway to get our hands upon the property to relieve the county of the liability of paying her keep.

"I am interested in two matters, to-wit:

"1. Whether Dade county has a lien upon the real-estate of the insane person subject of this letter, and her husband who also is confined in the institution at Nevada, for the payment of the cost of confinement where there is no personal property available.

"and

"2. the process necessary to enforce this lien if one there be, to defray the cost to the county,

"Your earliest possible reply will be appreciated."

Your request advises that the Probate Judge of Dade County, in this State, has made an order that a person adjudged to be a person of unsound mind be confined in a hospital at Springfield, Missouri, according to the provisions of Section 458.160, RSMo 1949. It appears that the person so adjudged to be of unsound mind by said Court and her husband are the owners of real property in Everton, Dade County, Missouri, as tenants by the entirety. It further appears that the husband of the person recently so adjudged by the Probate Court of Dade County to be a person of unsound mind, has also been adjudged to be a person of unsound

Honorable John R. Caslavka:

mind and is confined, and has been so confined for a number of years, in the State Hospital for the Insane at Nevada, Missouri. Your request further advises that a guardian has been appointed for the person so adjudged to be a person of unsound mind by the Probate Court of Dade County, Missouri, but that such person has no personal property available from which her guardian may pay the expenses incident to her temporary confinement in the said hospital at Springfield, Greene County, Missouri, preparatory to her contemplated confinement, by order of the Probate Court of said Dade County, in the said State Hospital for the Insane at Nevada, Missouri, permanently. Upon this state of facts you submit for our consideration and opinion two questions, to-wit:

"1. Whether Dade county has a lien upon the real-estate of the insane person subject of this letter, and her husband who also is confined in the institution at Nevada, for the payment of the cost of confinement where there is no personal property available,

"and

"2. the process necessary to enforce this lien if one there be, to defray the cost to the county."

Confinement of an insane person in a safe and suitable place by the guardian of such person is made the duty of such guardian until the Probate Court shall make such order for the restraint, safekeeping, support and maintenance of such insane person as the circumstances of the case may require, is provided for by Section 458.150, RSMo 1949, which reads as follows:

"If any person, by lunacy or otherwise, shall be furiously mad, or so far disordered in his mind as to endanger his own person or the person or property of others, it shall be the duty of his or her guardian, or other person under whose care he or she may be, and who is bound to provide for his or her support, to confine him or her in some suitable place until the next sitting of the probate court

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for the county, who shall make such order for the restraint, support and safekeeping of such person as the circumstances of the case shall require."

Section 458.160, RSMo 1949, providing for the order of confinement of such insane person by the Judge of the Probate Court pending further orders respecting such confinement reads as follows:

"If any such person of unsound mind, as is specified in section 458.150 shall not be confined by the person having charge of him, or there be no person having such charge, any judge of a court of record, may cause such insane person to be apprehended, and may employ any person to confine him or her in some suitable place, until the probate court shall make further orders therein, as in section 458.150 specified."

Section 458.170, RSMo 1949, providing for the payment for the support of such person attendant upon such confinement reads as follows:

"The expenses attending such confinement shall be paid by the guardian out of his estate, or by the person bound to provide for and support such insane person, or the same shall be paid out of the county treasury, upon the order of the county court, after the same shall be duly certified to them by the probate court."

The two questions submitted in your request refer specifically to the real estate owned by such persons and ask that this opinion determine whether a lien exists against such property in favor of Dade County, Missouri, for the reimbursement of said county for the expenses paid by such county for the confinement of one of such persons temporarily in the Hospital in Springfield, Greene County, and in the State Hospital at Nevada, and for the cost of the confinement of the other one of such persons in the Nevada Missouri institution who, as it is said, has been there confined for some years.

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The guardian of the estate of an insane person or other person whose legal obligation it is to pay such costs may be sued and a judgment rendered against him as such guardian for such costs and recovered under execution against the individual property of his ward. But the cost of such confinement cannot be recovered by judgment and execution from property, real or personal, owned by the insane ward, in this case both being insane and the owners, by the entirety, of the real estate described in your request, for the cost of the maintenance of either of said wards in a State Hospital for the Insane. Neither of such insane persons, in this case tenants by the entirety, has any individual right or title to the property that would subject such property during coverture to the obligation of the guardian to provide for the payment for the confinement of either of them or both of them. This is the general rule, although there are some exceptions, laid down by the Courts and textwriters. 30 C.J. 564, states the following text on this subject:

"An estate by entires is defined as an estate held by husband and wife by virtue of title acquired by them jointly after marriage. It is a peculiar and anomalous estate. It is a sui generis species of tenancy. The essential characteristic of an estate by the entirety is that each spouse is seized of the whole or the entirety and not of a share, moiety, or divisible part. Each is seized per tout et non per my. There is but one estate, and, in contemplation of law, it is held by but one person. But while a tenant by the entires owns the entire estate, yet where it is owned in fee it is not greater in quantity than any other estate in fee.

Honorable John R. Caslavka:

During coverture neither spouse has an estate of inheritance in property held as an estate by the entirety. * * *."

The Supreme Court of this State when this question has been before it for decision has adhered invariably to the rule. The Court in *Ashbaugh vs. Ashbaugh*, 273 Mo. Rep. 353, following the rule at l.c. 357 said:

"An estate by the entirety is created by a conveyance to the husband and wife by a deed in the usual form. It is one estate vested in two individuals who are by a fiction of law treated as one person, each being vested with the entire estate. Neither can dispose of it or any part of it without the concurrence of the other, and in case of the death of either the other retains the estate. It differs from a joint tenancy where the survivor succeeds to the whole estate by right of the survivorship; in an estate by entireties the whole estate continues in the survivor. The estate remains the same as it was in the first place, except that there is only one tenant of the whole estate, whereas before the death there were two."

Again, our Supreme Court in *Frost vs. Frost*, 200 Mo. Rep. 474, made the same holding. The Court, l.c. 481, held:

"An estate in entirety is not a joint tenancy in which each holds an individual right. A joint tenant may destroy the joint tenancy and thereby destroy the right of survivorship by conveying his right to a third person, in which event his former co-tenant and the third person to whom the conveyance is made become, as to each other, tenants in common. But neither the husband nor the wife in an estate of entirety can so destroy the character of the estate as to prevent the survivor becoming the sole owner. * * *."

We do not want to be understood as taking the position in this opinion that a husband and wife may not create a

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lien by their joint obligation or contract against real property held by them as tenants by the entirety. Mechanics' liens for materials furnished and work done on real property may attach to such property held by the entirety by husband and wife for improvements privately contracted for, and for public improvements, such as building sidewalks, enforceable against both during coverture when the contract was made by both of them while both are of sound mind. But not against such property owned by them by the entirety for the debts or obligations of one only of the two. 30 C.J. 574 states the text on that subject as follows:

"Mechanic's lien. A statutory mechanic's lien may attach to property held by husband and wife as tenants by the entirety where the contract was made or indebtedness incurred by both spouses, but not where incurred by one alone.

"Municipal lien. Where a husband and wife are owners by entirety of a lot in a city, and a municipal lien is filed against the wife alone, and judgment entered against her only, the lien is a nullity as to the husband and a sale under it passes no title."

We find no statutory or other authority of law allowing a lien to attach to real property owned by a husband and wife by the entirety in favor of a county for expense paid by such county attendant upon the confinement of either or both of such persons in a hospital or other place for the safekeeping of such insane person. All of the authorities we do find hold to the contrary, that is to say, that no such lien exists in favor of any such county. Sections 458.160 and 458.170, supra, provide that the county involved must pay the costs of such confinement. Neither of those sections, nor any other section of our statutes, gives such county a lien against the real property of such tenants by the entirety for the expense of such confinement of either or both of them as persons of unsound mind in a State Hospital for the Insane.

It appears clear from the authorities here cited and quoted that Dade County, Missouri, has no lien against the real estate of the persons named as the owners of such real estate by the entirety for the expense of the confinement of either of such persons in a hospital temporarily at

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Springfield, Missouri, by order of the Probate Court of Dade County, pending the removal of such insane person from said hospital to the State Hospital for the Insane at Nevada, Missouri, or for the expense of confinement of either or both of them at any time in said Hospital for the Insane at Nevada, Missouri. Since no lien exists against such property of such persons, the method of the enforcement of liens against real estate is not of interest here.

CONCLUSION

It is, therefore, considering the premises, the opinion of this office that Dade County, Missouri, has never had, and does not now have, a lien against the real estate of the persons described in your request as the owners thereof by the entirety for expense paid, or which may in the future be paid by said county for their confinement in hospitals for the insane by order of the Probate Court of said Dade County.

Your request for advice respecting the method of enforcement of liens against real estate need not be further considered since there is no lien in existence here.

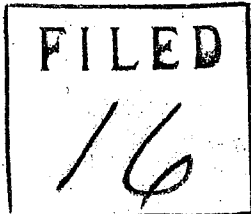
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Very truly yours,

JOHN M. DALTON
Attorney General

GWC:irk

HOUSE BILL NO. 369:
TRAILER CAMPS:
SALES TAX:



House Bill No. 369 is not a part of the Missouri Sales Tax Law, and therefore exemptions to the application of the Missouri Sales Tax Law do not apply to House Bill No. 369. Further, that trailer space rented by educational institutions to its students or affiliated personnel, is not subject to the application of House Bill No. 369, since such space is not offered for rental to the public.

April 26, 1954

Honorable L. M. Chiswell
Supervisor
Department of Revenue
State of Missouri
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"With relation to the provisions of House Bill 369 commonly referred to as the Trailer Camp Tax Act enacted by the 67th General Assembly, approved by the Governor and effective August 29, 1953, the question has arisen as to whether under the provisions of this act trailer camps operated by those institutions provided with statutory exemption with relation to the Missouri 2% Sales Tax under Section 144.040 Revised Statutes of Missouri 1949 are exempt from being required to collect and remit the 3% trailer camp tax imposed by the act even though such trailer camp may be operated solely for the use of student bodies or personnel affiliated with such institutions exempt from sales tax.

"It is respectfully requested that this department be provided with an official opinion whether the statutory exemption from sales tax granted under the law relating to sales tax applies also to those referred to as operating a taxable privilege as defined in the Trailer Camp Tax Act."

The first question which we have to answer is whether House Bill No. 369, referred to by you, was enacted as a part of the Sales Tax Law. If it was, then any exemption to the Sales Tax

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Law would apply to House Bill No. 369; if it was not, then obviously such Sales Tax Law exemption would not apply to House Bill No. 369.

It is our opinion that House Bill No. 369 does not impose a sales tax and is not a supplement to the Missouri Sales Tax Law.

We note that in V.A.M.S., 1953 Supplement, House Bill No. 369 has been placed in Chapter 144, RSMo 1949, which is the Sales Tax Chapter. This, however, is not conclusive, and does not prove that House Bill No. 369 is a sales tax.

It seems clear to us from the language of House Bill No. 369 that it is not, and was not intended to be, part of the Sales Tax Law. We feel that this is evidenced by the underlined (by us) portion of Section 144.560, V.A.M.S., 1953 Supplement, which reads:

"1. It is hereby declared to be the legislative intent that every person is exercising a taxable privilege in the business of renting, leasing or letting any living quarters in connection with any trailer camp as defined by section 144.550. For the purpose of said privilege a tax is hereby levied in an amount equal to three per cent of and on the total charge for such living quarters by the person charging or collecting the rental; provided, that such tax shall apply to trailer camps as defined in sections 144.550 to 144.590, whether or not there be in connection with the same, any dining room, cafes, filling stations, or other business where merchandise or service of any kind is sold or offered for sale to the public.

"2. The tax provided for herein shall be in addition to the total amount of rental and shall be charged by the lessor or person receiving the rent in and by said rental arrangement to the lessee or person paying the rental, and shall be due and payable at the time of the receipt of such rental payment by the lessor or person receiving such rental payment. The owner or lessor shall remit the tax to the collector of revenue at the times and in the manner provided for retailers to remit taxes under the Missouri sales tax act. The same duties imposed by the said sales tax act upon dealers at retail in tangible personal property respecting the collection and remission of the tax, the making of returns, the keeping of books and records and the

Honorable L. M. Chiswell

compliance with the rules and regulations of the department of revenue in the administration of the said sales tax act shall apply to and be binding upon all persons who manage or operate trailer camps, and to all persons who collect or receive such rents on behalf of an owner taxable under sections 144.550 to 144.590. Violations of sections 144.550 to 144.590 shall be punishable in the same manner and to the same extent as provided in said sales tax act."

Furthermore, by Section 144.480 RSMo 1949, all revenue collected or received by the Director of Revenue from the sales tax shall be deposited in the state treasury, to the credit of the ordinary revenue fund; whereas, the proceeds from the tax imposed by House Bill No. 369 are to be placed, by Section 144.590, V.A.M.S., 1953 Supplement, in a special fund to be known as the "trailer camp school tax fund", which is credited in the state treasury and is to be paid back to the several counties of the state, to be allocated to the school district of the county in that proportion which the amount of tax collected in each district bears to the total amount collected in the county, and shall be used only for the support of the other public schools in said districts.

From the above, it seems clear to us that House Bill No. 369 is not a sales tax, and that, therefore, exemptions to the application of the sales tax law would not apply to House Bill No. 369.

Your specific question is whether House Bill No. 369 would apply "though such trailer camp may be operated solely for the use of student bodies or personnel affiliated with such institutions exempt from sales tax."

In regard to this matter we note Section 144.550 V.A.M.S., 1953 Supplement, which reads:

"As used in sections 144.550 to 144.590 the term 'trailer camp' shall mean a place where space is offered, with or without service facilities, by any person or municipality to the public for parking and accommodation of two or more automobile trailers which are used for lodging, for either money consideration or an indirect consideration or benefit to the lessor or owner in connection with a related business, such space being hereby defined as 'living quarters', and the rental price paid therefor shall include all service charges paid to the lessor."

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Since a trailer camp in which space is rented solely to students or affiliated personnel of an educational institution does not come within the definition of "trailer camp", as the term is used in House Bill No. 369, which means a place where space for automobile trailer parking is offered to the public, we do not believe that House Bill No. 369 has any application to trailer space rented by educational institutions to its student or affiliated personnel, since such educational institution does not offer such rental space to the public.

CONCLUSION

It is the opinion of this department that House Bill No. 369 is not a part of the Missouri Sales Tax Law, and that, therefore, exemptions to the application of the Missouri Sales Tax Law do not apply to House Bill No. 369.

It is our further opinion that trailer space rented by educational institutions to its students or affiliated personnel is not subject to the application of House Bill No. 369, since such space is not offered for rental to the public.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

BOARD OF ELECTION COMMISSIONERS: (Counties of 200,000 to 450,000 inhabitants); Procedure for acquisition of (1) Office furniture, equipment and supplies, (2) Election supplies, equipment and services, and, (3) Voting machines.



April 30, 1954

Honorable John J. Cole, Chairman
Board of Election Commissioners
St. Louis County
Clayton 5, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"I am writing as Chairman of the St. Louis County Board of Election Commissioners to request an opinion from your Department concerning our purchasing authority and procedure with reference to (1) Office furniture, equipment and supplies, (2) election supplies, equipment and services, and (3) voting machines.

"We call your attention specifically to Section 113.110 R. S. No., 1949, which gives the Election Board authority to provide election supplies and equipment (and we presume services too, such as hauling and storing), subject to the provisions of Section 50.660, the County Budget Law. We want to know if this latter Statute is to be construed to require all such contracts to be executed by the St. Louis County Purchasing Agent, an officer created by the St. Louis County Charter, Article V, Section 38. If it is to be so construed, that is, to vest sole authority to make purchases in the County Purchasing Agent, does the Election Board have the right and the duty to select the items to be purchased or in some manner designate those which we

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feel are most suitable for the needs of the Election Board or for the voters of St. Louis County.

"In respect to voting machines, we refer you further to Chapter 121, Mo. Rev. Stat. Cumulative Supplement 1953 Sec. 121.010 and Section 121.070 which authorizes the Election authority to adopt and provide voting machines. Section 121.020 directs that the Governing Body (County Council) must provide within limitations imposed by law, for the payment of the purchase price, "as may be proposed by the Election authority". Does this last quoted phrase and the other sections of law authorize the Election Board to select the most suitable voting machine or is the choice left to the County Council which pays for them.

"Finally we might add that Article III, Section 22, Paragraph '6' of the St. Louis County Charter requires the County Council 'to establish the procedures governing the making of County contracts and the purchasing of County supplies and equipment by competitive bidding'. The Council has by order established such procedures. We would like to know to what extent our purchases in the above three categories are controlled, if at all, by the above provisions of the St. Louis County Charter and the ordinances regarding purchasing procedures enacted pursuant thereto.

"May we urge an immediate consideration and reply to the foregoing."

I.

Procedure for the Acquisition of Office Furniture, Equipment and Supplies.

It is our understanding that in this particular portion of your inquiry you refer to the office furniture, equipment and supplies used by your board in its office, and do not include therein supplies incident to the actual conduct of elections.

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Upon this premise we direct your attention to the provisions of Section 113.060, RSMo 1949, which reads in part, as follows:

"Upon the appointment of said election commissioners the county court shall at once provide and equip suitable offices for such commissioners and their assistants, * * *." (Emphasis ours.)

It seems to be the clearly expressed legislative intent as exemplified by the quoted portion of this statute that the duty of providing office furniture, equipment and supplies for the board has been enjoined upon the county court. Of course, in this particular county operating under a special charter adopted pursuant to constitutional authorization, the functions of the county court are discharged by the body denominated the "county council." We note that under Section 6, Article III of the Charter for St. Louis County Missouri, the powers and duties vested in county governing bodies in other counties has been vested in the county council and we therefore hold it is the duty of that body to provide and equip the offices of the Board of Election Commissioners. The mechanics incident to the purchase of such equipment will, of course, be those followed by the county council in making all other similar purchases.

II.

Procedure for the Acquisition of Election Supplies, Equipment and Services.

This phase of your inquiry relates to matters which are actually a part of the election machinery and the casting of ballots. We believe that such items are in a different category than those discussed under I, supra, in so far as the method of acquisition of such items is concerned. We direct your attention to the provisions of Section 113.110, RSMo 1949, reading as follows:

"Said board of election commissioners is hereby authorized to provide, subject to the provisions of section 50.660, all necessary ballot boxes, registration books, verification lists, poll books, tally sheets, booths, printed ballots, blanks,

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stationery and all necessary supplies and equipment for the conduct and holding of registrations and elections, including primary elections, and for every incidental purpose connected herewith. Said election commissioners shall also be authorized to require bonds sufficient in sum to insure prompt and faithful compliance with all such contracts and to contract for or rent the polling places and places of registration and outfit and equip the same and secure light, heat, and other conveniences for same. In all cases where the printing of official ballots is awarded to a bidder, the board of election commissioners may require the constant guarding of such ballots by a guard of their own selection, at the expense of the contractor, from the beginning of the printing of the same until their safe delivery at the office of said board of election commissioners. The salaries and expenses of said board of election commissioners shall be audited and paid as the salaries and expenses of other county officers are audited and paid." (Emphasis ours.)

Here again it seems to be the General Assembly has clearly expressed its intent with respect to the acquisition of items of the nature under consideration. The language of the statute is definite and unambiguous and therefore calls for no construction.

We believe that in holding the Board of Election Commissioners is authorized to acquire items of this nature we are but following the intent of the General Assembly as such intent has been consistently expressed, at least from 1935. In examining the historicity of Section 113.110, RSMo 1949, we find that in an act found Laws of Missouri, 1935, page 229, paragraph 47, such board was unqualifiedly authorized to acquire such items. At that time the board was granted the power to directly negotiate for such acquisition and after having audited claims for the payment thereof, were further authorized to certify such claims direct to the county treasury for payment.

Subsequently, in an act found Laws of Missouri, 1937, page 231, this unqualified authorization was modified to

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require such purchases to be made subject to the provisions of the County Budget Law. However, the power was left with the board to determine the necessary items to be purchased and the statute remains in this form as found in the last revisions.

From the foregoing we reach the opinion that the purchase of election supplies, equipment and services is to be made by the Board of Election Commissioners following the procedure established by applicable statutory enactments with respect to the procedure to be followed in consummating such purchases and contracts with respect thereto.

At this point we take note of the fact that St. Louis County operates under a special charter adopted pursuant to constitutional authorization contained in the Constitution of Missouri, 1945. We consider the following constitutional provisions to be pertinent:

"Sec. 18 (b). Provisions required in county charters.--The charter shall provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the Constitution and laws of the state." (Emphasis ours.)

The charter so adopted in so far as it relates to the duties enjoined by the County Budget Law upon officials in other counties, provides for the creation of a Division of Purchasing. Section 38, Article V of the charter reads as follows:

"The department of Administration shall have the following divisions: Division of the Budget, Division of Purchasing, Division of Law and such others as may be created by ordinance. These divisions shall be headed by the County Supervisor, the Purchasing Agent, and the County Counselor, respectively." (Emphasis ours.)

We are further advised that the county council has pursuant to the provisions of Paragraph 6, Section 22,

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Article III of the chapter established the procedures relative to the making of county contracts and the purchasing of county supplies. This charter provision reads as follows:

"Section 22. Pursuant to and in conformity with the Constitution of Missouri and without limiting the generality of the powers vested in the Council by this Charter, the Council shall have, by ordinance, the power:

"(6) To establish the procedures governing the making of County contracts and the purchasing of County supplies and equipment by competitive bidding, and to prescribe the form and contents of the annual County financial statement, provided that such procedures and limitations as are now established by law shall continue in effect until superseded by ordinances of the Council; * * *"

We therefore further believe that the actual purchases and negotiation of contracts are to be made and negotiated in accordance with such procedure so established. This is not to be taken to mean, however, that such purchasing officer shall have any discretion with respect to the type, kind or number of such items so purchased or contracts so let, as it is our belief that all matters of this nature rest in the sound discretion of the Board of Election Commissioners.

III.

The Acquisition of Voting Machines.

Provisions for the adoption of voting machines in your county have been authorized under the provisions of Chapter 121, RSMo 1953 Cumulative Supplement. The specific authority is contained in Section 121.010. It will be observed that under the provisions of Section 121.020 such adoption of this method of balloting is conditioned upon the affirmative action of the inhabitants of the election district and the providing of necessary funds required for the acquisition of voting machines. We are advised that both of these steps have been taken within your election district and that the Board of Election Commissioners has formally adopted this method of voting.

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At this point we believe the provisions of Section 121.070, RSMo 1953 Cumulative Supplement, particularly Subsections 1 and 3, become germane to this portion of your inquiry. These portions of the statute read as follows:

"1. The election authority in jurisdictions adopting voting machines shall as soon as practicable thereafter provide for each polling place where voting machines are to be used, one or more machines, in complete working order.

* * *

"3. When not in use at an election the election authority shall have the custody of the machines."

Incidental to your inquiry and to anticipate a question which might arise in the future with respect to the delivery and installation of such voting machines we at this point direct your attention to the provisions of Subsection 1 of Section 121.080, RSMo 1953 Cumulative Supplement, reading as follows:

"1. It shall be the duty of the election authority in such counties to have the voting machine and all necessary furniture, equipment, records and supplies, at the polling places before the fixed time for the opening of the polls, and have the counters, if any are provided, except the protective counter, on the machines set at zero (000), and otherwise in good and proper order for use at such election."

This portion of the statute mentioned places the duty of the delivery and installation of the voting machines at the polling places directly upon the Board of Election Commissioners, particularly, when read in conjunction with Subsection 3 of Section 121.070, quoted supra.

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From the foregoing we arrive at the conclusion that the duty has been enjoined upon the Board of Election Commissioners to select the voting machines to be used in the conduct of elections within the election district. It is, of course, elementary that the selection of a particular type of machine must be governed by the exercise of the sound discretion of the Board of Election Commissioners based upon substantial evidence indicating that the selection of the particular type of machine is in the best interest of the people and is a more appropriate machine than those of any other type or types.

We think this conclusion to be reasonable upon consideration of the entire scheme for the conduct of elections within the geographical area of the election district within which your Board of Election Commissioners functions. The entire act discloses an intent on the part of the General Assembly that complete supervision and control of registration and balloting be vested in your body and it necessarily must follow that no construction of the statutes relating to the conduct of such elections must be indulged in which might serve to limit or unduly restrict the discharge of such duties so enjoined upon your body.

What we have said heretofore relates merely to the determination of the necessity in the selection of the appropriate type of voting machine. After having made such determination the formal acquisition thereafter must follow the procedure established for the acquisition of all other supplies and equipment for the various departments of county government. Inasmuch as we have discussed this at some length under II, supra, we will not unduly lengthen this opinion by a repetition of what was said therein.

CONCLUSION

In the premises we are of the opinion,

(1) That it is the duty of the county council of St. Louis County to provide such office furniture, equipment and supplies for the operation of the office of the Board of Election Commissioners of said county as may be reasonably necessary, such purchases to be made following the procedures established by ordinance of the county council pursuant to the provisions of Paragraph (6), Section 22 of Article III of the Charter for St. Louis County;

Honorable John J. Cole

(2) That it is the duty of the Board of Election Commissioners of St. Louis County to select, determine and provide for the acquisition of such election supplies, equipment and services as may be necessary to discharge the duties imposed upon such Commission, and that such acquisition is to be made in accordance with the procedures established under Paragraph (6), Section 22, Article III of the Charter for St. Louis County, and,

(3) That it is the duty of the Board of Election Commissioners of St. Louis County to determine in the exercise of its sound discretion the appropriate type of voting machines to be used in the conduct of elections within such county and that such voting machines are to be acquired in accordance with the procedures established pursuant to the provisions of Paragraph (6), Section 22, Article III, Charter for St. Louis County.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

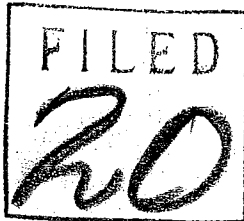
JOHN M. DALTON
Attorney General

WFB:vlw

SANITY HEARINGS:

SHERIFF:

The prosecuting attorney of a county may represent the sheriff of the county at a sanity hearing in which the sheriff was the informant; state is an interested party in a sanity hearing because the public at large may suffer in person or property from the dangerous vagaries of the individual alleged to be of unsound mind, and because such person by a dissipation of his property may become a charge upon the public purse.



March 11, 1954

Honorable Robert E. Crist
Prosecuting Attorney
Shelby County
Shelbyville, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Reference is made to your letter of September 2, 1953, addressed to this office wherein it is stated that 'it is improper for a prosecuting attorney to represent, at a sanity hearing, held within his county, the person whose sanity is the subject of inquiry. Also that it is improper for a prosecuting attorney to represent, in his private capacity an informant in a sanity hearing but that it is the duty of the prosecuting attorney to represent the state at all sanity hearings held within his county'. This conclusion was based on Opinion No. 59-52 (Williamson) prepared for Roy W. McGee, Jr., Greenville, Missouri, January 7, 1952.

"In accordance therewith please advise if it is proper for a prosecuting attorney to represent, at a sanity hearing, held within his county, the informant when the informant is the sheriff of such county, and is acting in his official capacity as Sheriff? Also, I would like to know what interest the state and/or county has in a sanity case which is to be protected by the prosecuting attorney."

On page 2 of the opinion rendered by this department to Honorable Roy W. McGhee, on January 7, 1952, referred to by you above, we quoted Section 458.040 RSMo. 1949, which reads as follows:

Honorable Robert E. Crist

"Whenever any judge of the county court, magistrate, sheriff, coroner or constable shall discover any persons, resident of his county, to be of unsound mind, as in Section 458.020 mentioned, it shall be his duty to make application to the probate court for the exercise of its jurisdiction; and thereupon the like proceedings shall be had as in the case of information by unofficial persons."

It is our belief that when any of the county officers listed above, which includes the sheriff, files an information requesting a sanity hearing for some individual, that he does so as a representative of the state, and that in effect such action is the action of the state, in which case it is proper for him to be represented by the prosecuting attorney, who is charged by Section 56.060 RSMo. 1949 (quoted on page 3 of the opinion) with the duty of prosecuting and defending all civil actions in which the state may be concerned or interested.

In the McGhee opinion we held that the state is interested in a sanity proceeding for the reasons set forth on page 3 of the said opinion, which reasons are thus stated:

"In the case of State v. Skinker, 126 S.W. 2d 1156, 1.c. 1161, the court stated:

'* * * But it is also true that in these lunacy proceedings, the state, as *parens patriae*,--the community,--society,--has an interest, both to protect the insane person and to protect the public from possible injury and to the end that such person may not, through mental incapacity, waste his estate and become a charge upon the public. See State ex rel. Paxton v. Guinotte, 257 Mo. 1, 165 S.W. 718, 51 L.R.A., N.S., 1191, Ann. Cas. 1915D, 658.* * *'

"In the case of State ex rel. v. Guinotte, 257 Mo. 1, 1.c. 11, the court stated:

'* * * Who are the parties in interest in an inquest de lunatico under our

Honorable Robert E. Crist

statute? Manifestly, (a) the public at large, that it may not suffer in person or property from the dangerous vagaries or mania of the individual alleged to be of unsound mind, and for that such person by a dissipation of his property, may not become a charge upon the public purse,* * *!"

As we stated above, we believe that, when a sheriff files an information asking for a sanity hearing, his action is equivalent to an action by the state. That position is, we believe, supported by the case of *ex parte Witmer*, 247 S.W. 2d 547. At l.c. 550 of its opinion in that case, the Missouri Supreme Court stated:

"As stated, petitioner's other ground for saying that the probate court acquired no jurisdiction over him is because the complaining witness, Vernon Reynolds, sheriff of Cedar County, also served the notice of the sanity hearing. The basis for this contention is Sec. 58.190, R.S. 1949, V.A.M.S., which provides that when the sheriff whose duty it is to serve process, is a party or is interested in the suit, the coroner shall serve and execute all write.

"Sec. 458.040 provides that 'Whenever any * * * sheriff * * * shall discover any persons, resident of his county, to be of unsound mind, * * * it shall be his duty to make application to the probate court for the exercise of its jurisdiction; * * *.'

"And under Sec. 458.090 the sheriff, acting officially, is protected against the payment of costs in the event the person alleged to be insane shall be discharged.

"Was Mr. Reynolds a party within the meaning of Sec. 58.190 and thus disqualified from serving the notice? There is no claim that he was personally interested in the outcome of the proceeding.

Honorable Robert E. Crist

"In State ex rel. Terry v. Holtkamp, 330 Mo. 608, 51 S.W. 2d 13 at loc. cit. 19, our Supreme Court said: 'A lunacy proceeding is a civil, as distinguished from a criminal, proceeding; yet it is a proceeding in personam by the state; the public is interested in the welfare of the person alleged to be insane.' Citing State ex rel. v. Guinotte, 257 Mo. 1, 165 S.W. 718, 51 L.R.A., N.S. 1191."

As we stated above, since the action of the sheriff in signing an information for a sanity hearing is an action by the state, and since it is incumbent upon the prosecuting attorney to represent the state, in all civil actions in which the state is interested, and since a sanity hearing is held to be a civil action, and since the state is interested in a sanity hearing, the prosecuting attorney may represent the sheriff in a sanity hearing held because of an information filed by the sheriff requesting such hearing.

CONCLUSION

It is the opinion of this department that the prosecuting attorney of a county may represent the sheriff of the county at a sanity hearing in which the sheriff was the informant.

It is the further opinion of this department that the state is an interested party in a sanity hearing, because the public at large may suffer in person or property from the dangerous vagaries of the individual alleged to be of unsound mind, and because such person by the dissipation of his property may become a charge upon the public purse.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

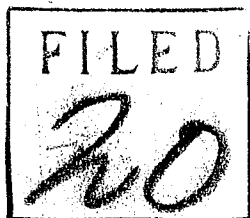
Very truly yours,

John M. Dalton
Attorney General

HPW/vtl

INSANE PERSONS:
CONVICTS:
PAROLE:

Superintendent of the state hospital in which an insane person is incarcerated pursuant to an order of the Governor suspending his sentence because of such insanity has no power to return him to the custody of the prison officials absent an order to that effect from the Governor.



November 18, 1954

Honorable W. J. Gremer, M.D.
Superintendent
Missouri State Hospital No. 1
Fulton, Missouri

Dear Sir:

In your recent request you ask this office for an opinion on the following facts:

"On July 24, 1953, we received at this hospital one E. H. as a transfer from the Missouri State Penitentiary on an order of the Governor in accordance with statutes No. 549040. This individual had been convicted in the April 1953 term of the circuit court, Cape Girardeau County--having been actually sentenced by an order of the court May 2, 1953 to two years in the Missouri State Penitentiary for grand larceny.

"Following his admission here, it was our opinion that this individual was suffering from Schizophrenic Reaction, Acute Undifferentiated type. He was definitely insane. Under treatment he has shown no improvement whatsoever.

"Facts subsequently remain that this patient is a resident of the State of Illinois, and his family have been anxious to get him returned to the State of Illinois for treatment. I am not familiar with sick parole statutes under the State penal system, and for several months I have had repeated requests to attempt to determine whether an individual confined here under such circumstances could by any legal means be returned to the custody of authorities by the Board of Probationary paroles under the sick parole statutes.

"Statute No. 549050 would indicate to me, that I have no authority to do anything but to certify back to the Governor that the patient has completely recovered, as

Honorable W. J. Cremer, M.D.

far as transferring back to the penal authorities jurisdiction. In this particular case, it would seem that recovery is unlikely and I will, therefore, never be in such a position to so certify to the Governor.

"I would appreciate from you an opinion concerning the facts in this case--whether there is any statutory regulations with which I am not familiar, that would possibly give me the authority to certify to the Governor that while this patient is not recovered and recovery is unlikely that I would urge that he be returned to the custody of penal authorities for sick parole consideration. I understand that the family have given assurance that he would be placed under medical jurisdiction if such consideration is possible."

As you indicate in your letter, Section 549.050 RSMo 1949 relates only to a situation where the superintendent certifies to the return to sanity of a convict who has theretofore completed two-thirds of his sentence before his transfer to the asylum, and would have no bearing upon the problem which you face. In the present case, you indicate not only that the convict has not recovered his sanity but that he is unlikely to do so and, of course, in such circumstances, you could not certify to his recovery either under the provisions of Section 549.050 supra, or under the general law of the state as set out in the case of State v. Brackington, 349 Mo. 662, 162 SW2d 860. In the present case, the convict is legally held in your institution pursuant to an order of the Governor, issued under the authority granted him by Section 549.040 RSMo 1949, and his release for treatment elsewhere can only be accomplished by one having discretion in the matter of the disposition of convicts who become insane before the completion of their sentence. Since the authority of the Board of Probation and Parole extends only to "any person confined in any correctional institution" by the provisions of Section 549.240 RSMo 1949, such Board could not have such discretion in the case of the convict whom you mention since he is presently legally confined in your institution rather than in a correctional institution, and therefore, it would appear that the discretion in this matter is vested by the provisions of said Section 549.040 in the hands of the Governor.

This section (549.040) gives the Governor authority "to pardon such lunatic, commit or suspend, for the time being, the execution of such sentence...".

Honorable W. J. Gremer, M.D.

Thus it appears that the Governor has large discretion in such cases as is shown by such decisions as that of the Missouri Supreme Court in the case of Lime v. Blagg, 345 Mo. 1, 131 SW2d 583, and that the Governor has wide latitude in the nature of the order that he may issue, and that the action he takes may be conditioned in any manner that is not illegal, immoral, or impossible. See ex parte Strauss, 320 Mo. 349, 7 SW2d 1000; Ex parte Webbe, (Mo. Sup.) 30 SW2d 612; and Silvey v. Kaiser, (Mo. Sup.) 173 SW2d 63.

From the above, it appears that the convict about whom you inquire is properly incarcerated in your institution pursuant to the order of the Governor, that the Governor has large discretion as to the disposition to be made in the case of such an insane prisoner, and that any problems now confronting you as to the disposition of such convict should be brought to the attention of the Governor for his consideration.

CONCLUSION

From the foregoing, it is the conclusion of this office that the superintendent of a state hospital wherein an insane convict is incarcerated has no authority to return such convict to the custody of prison officials prior to his return to sanity, that the discretion and the handling of such matters is vested in the hands of the Governor of the State of Missouri, and that any facts which might make a change desirable should be brought to the attention of the Governor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

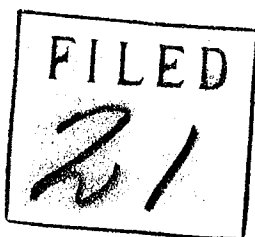
Very truly yours,

JOHN M. DALTON
Attorney General

FLH/sm

MISSOURI STATE HIGHWAY COMMISSION:
STATE HIGHWAYS:

Missouri State Highway Commission has sole discretion in the location of state highways and may exact from political subdivisions contributions for the purchase of right-of-way therefor.



March 19, 1954

Honorable E. Gary Davidson
Missouri State Senate
7321 Murdock
Shrewsbury 19, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"The State Highway Commission of Missouri, under agreement with the County of St. Louis and the City of St. Louis, has surveyed and planned certain thoroughways or expressways as part of the State's primary highway system to be in and through St. Louis County and St. Louis City. These projects are to be constructed with State and Federal-aid urban funds, the latter made available by an act of Congress to expedite traffic in metropolitan areas throughout the United States.

"It is my understanding now that the State Highway Commission refuses to construct these necessary highways in St. Louis County and the City of St. Louis, after having planned them, unless the political subdivision (St. Louis County and St. Louis City) through which they will pass will pay in money, a sum equivalent to one-half of the cost of acquiring the right-of-way.

"In this connection, I would appreciate your opinion on these questions:

"1. May the State Highway Commission, in its discretion in reference to the expenditure of constitutional public highway funds

Honorable E. Gary Davidson

and Federal-aid funds, demand and require an additional sum of money from a political subdivision of the State of Missouri as a condition to the location and construction of a necessary and essential highway into and through such political subdivision?

"2. If these requirements and demands are unauthorized and unlawful, what remedy is available to such political subdivision to compel the State Highway Commission to administer the constitutional road funds and Federal-aid funds in a manner consonant to law?"

The authority of the Missouri State Highway Commission was greatly extended by the adoption of the Constitution of 1945.

We direct your attention to the following portion of Section 29, Article IV of the organic law of this state:

"* * * It shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitations and conditions imposed by law as to the manner and means of exercising such authority; and authority to limit access to, from and across state highways where the public interest and safety may require, subject to such limitations and conditions as may be imposed by law." (Emphasis ours.)

We think it pertinent at this point to call to your attention the constitutional language which has been underscored. It appears therefrom that the people of Missouri have reserved to their representatives constituting the General Assembly the power to impose limitations and conditions upon the exercise of certain powers to be exercised by the State Highway Commission. However, it will be noted that such was not done with respect to the delegated authorization to such Commission to locate, relocate, design and maintain highways.

This broad constitutional grant of authority to the State Highway Commission has been recognized by the appellate courts

Honorable E. Gary Davidson

of this state. We direct your attention to State ex rel. v. Curtis, 222 S.W. (2d) 64, 1.c. 68:

"* * * The power to locate a state highway, to determine its width, type of construction and the extent of land necessary for economical and proper construction are vested in the sound discretion of the State Highway Commission, uncontrolled by the courts except to compel strict compliance with the statutes and to prevent the taking of private property for a private or non-public use.* * *"

Narrowing this opinion at this point down to the precise question which you have presented under paragraph 1, we believe that some of the language found in Subsection (2) of Section 30, Article IV of the Constitution may be of some assistance in determining the meaning to be accorded the various constitutional provisions relating to the State Highway Commission. The quoted subsection reads in part as follows:

"* * * except that the commission may, in its discretion, repay, or agree to repay, any cash advance by a county or subdivision to expedite state road construction or improvement; * * *."

The quoted language indicates that the State Highway Commission has power to use funds available to it for the purpose of repaying, or entering into an executory contract to repay, counties or other political subdivisions cash which has been advanced for the purpose of expediting road construction. It seems therefrom if such power has been delegated to the Commission that in the exercise of its discretion such Commission may require as a condition precedent to the location of a state highway in a particular location that any county or other political subdivision interested in such location pay a portion of the costs of acquiring necessary rights-of-way. Absent fraud or arbitrariness on the part of the State Highway Commission the courts have recognized their inability to coerce through appropriate legal action the State Highway Commission into taking any particular steps with respect to the location of state highways. In disposing of a contention that a refund was properly due to political subdivisions immediately upon the ascertainment of the amount thereof the Supreme Court of Missouri said in

Honorable E. Gary Davidson

State ex rel. v. State Highway Commission, 163 S.W. (2d) 948,
l.c. 954:

"* * * The refund is to be allowed by the commission. Hence it is the commission which must decide this necessary question of fact. The amount determined under the statutory rule and the time of payment lie wholly within the jurisdiction of the commission. State ex rel. State Highway Commission v. Thompson, 331 Mo. 321, 53 S.W. 2d 273. When jurisdiction to find and determine facts is vested by law in an administrative tribunal the courts may not substitute their judgment for that of the commission. Howlett v. Social Security Commission, 347 Mo. 784, 149 S.W. 2d 806, loc. cit. 809; Hughes v. State Board of Health, 345 Mo. 995, 137 S.W. 2d 523.* * *"

From our examination of the constitutional provisions relating to the State Highway Commission and from the cases decided by the appellate courts of this state with respect to the powers of such commission, we are persuaded to the belief that absent fraud or arbitrariness the State Highway Commission has the sole discretion with respect to the location of state highways. Having such sole discretion it does not seem to us that attaching as a condition precedent to the location of a state highway in any particular location, the acquisition in whole or in part of the rights-of-way necessary therefor, either directly by a political subdivision or through money supplied for that purpose by such political subdivision, is to be held constructively fraudulent or arbitrary as a matter of law.

Having reached the conclusion we have with respect to your first question no necessity arises to pass upon the further matters submitted in question 2.

CONCLUSION

In the premises we are of the opinion that the State Highway Commission may reasonably require that a political subdivision either procure the necessary rights-of-way or supply

Honorable E. Gary Davidson

the money required to acquire the same or a portion thereof, as a condition precedent to the location and construction of a particular state highway.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

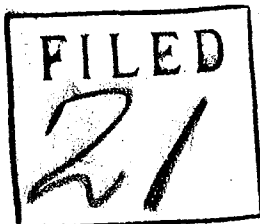
Yours very truly,

JOHN M. DALTON
Attorney General

WFB:VLW

COUNTIES: PARKS:

County court has no authority to make donation to city for park use in absence of joint cooperative agreement.



July 8, 1954

Honorable Dick B. Dale, Jr.
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"The County Court of Ray County, Missouri, has asked this Office if the Court could make a donation from County funds to a shelter house fund, which shelter house will be constructed in the City Park of Richmond, Missouri, which is the County Seat of Ray County, Missouri. After a diligent search in the Statute, I failed to find any Statute which would authorize a County donation to a City Park fund. Since the County Court would like to make the donation, which is needed for the erection of a shelter house, I am herewith respectfully requesting an official opinion from your Office in answer to this question."

We believe that your question may be answered by reference to a prior official opinion of this department rendered under date of May 12, 1952, to the Honorable Roger Hibbard, Prosecuting Attorney, Marion County. You will observe that in the opinion mentioned it has been held that a county may not contribute money to a municipal corporation for aid in sewer construction. We think the same reasoning equally applicable to the question which you have proposed.

Honorable Dick B. Dale, Jr.

However, you will note that on page two of the opinion it is indicated that in certain circumstances similar activities might be lawfully carried out. The qualification attached to such joint cooperative action is that with respect to each of the jointly participating municipalities or subdivisions the proposed activity be within the lawful scope of its powers.

This reference relates to a provision of the Constitution of Missouri, 1945, found as Section 16, Article VI, which reads as follows:

"Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

Pursuant to this constitutional authorization the General Assembly has enacted statutes implementing the subject matter thereof. We direct your attention to the provisions of Section 70.210 to 70.320, inclusive, RSMo 1949. These statutes provide the method under which joint cooperative activities may be lawfully conducted.

In view of the qualifications expressed in the opinion attached hereto we further direct your attention to the provisions of Section 64.450, RSMo 1949, authorizing county courts in all counties to provide revenue for the purchase of county parks and the maintenance thereof. We further direct your attention to Section 90.010, RSMo 1949, authorizing cities to establish and maintain parks. We think that these and other related statutes sufficiently disclose that a joint cooperative agreement between a county and a city for the establishment and maintenance of a park system is lawful, inasmuch as each of the contracting parties have the power to engage in such activities separately.

CONCLUSION

In the premises we are of the opinion that a county court may not contribute funds to a city for the purpose of aiding

Honorable Dick B. Dale, Jr.

such city to establish and maintain a park or any facility related thereto.

However, we are of the further opinion that such activity may be done upon a joint cooperative basis in accordance with the laws of the State of Missouri enacted under the authority of Section 16, Article VI of the Constitution of Missouri, 1945.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

By _____
Julian L. O'Malley
Acting Attorney General

WFB:vlw

Enclosure - 5-12-52 - Roger Hibbard

SCHOOL DISTRICTS: : Tangible personal property of an individual
TAXATION: : should be assessed to the benefit of the
PERSONAL PROPERTY: : school district wherein the owner of the
: property resides, even though such property
: itself be located in another school district
: within the same county.
.....

December 21, 1954

Honorable Dick B. Dale, Jr.
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Mr. Dale:

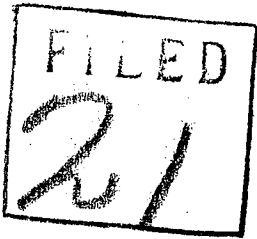
By letter dated December 15, 1954, you requested an opinion of this office on the following question:

"Where a property owner, who is a resident of Ray County, Missouri, residing in the City of Richmond, and owning the real estate on which he resides, and also owns tangible personal property such as livestock which is situated outside of the City of Richmond, and in a different school district, is the tangible personal property assessed in the same school district as where the tax payer resides on his own real estate, or is the tangible personal property assessed in the school district in which it is situated?"

Section 137.090, RSMo 1949, makes the following provision:

"All tangible personal property of whatever nature and character situate in a county other than the one in which the owner resides shall be assessed in the county where the owner resides, except tangible personal property belonging to estates, which shall be assessed in the county in which the probate court has jurisdiction."

The above section does not explicitly answer your question. However, in State ex rel. vs. Pearson, 273 Mo. 72, 199 S.W. 943, it is said that what is now Section



Honorable Dick B. Dale, Jr.:

137.090 establishes the doctrine that personal property follows the owner for purposes of taxation. In the Pearson case, the defendant was a resident of one school district in Dade County, and owned and operated a farm within another school district within the same county. On the farm were horses, cattle, farming implements, etc. owned by defendant. The County Collector sued to recover school taxes upon the personal property on the farm, for the use of the school district in which defendant resided. The court held that the personal property on the farm was taxable in the school district of defendant's residence. The factual situation in the Pearson case and the one at hand are virtually identical. And, in State ex rel. Kelly vs. Shepperd, 218 Mo. 656, 131 Am. St. Rep. 568, the Supreme Court concluded that personal property is taxable in the school district of the owner's residence, rather than the district wherein the property is located.

Thus, we conclude that the taxable personal property of an individual should be assessed and taxed in the district wherein the owner resides.

CONCLUSION

It is, therefore, the opinion of this office that tangible personal property of an individual should be assessed to the benefit of the school district wherein the owner of the property resides, even though such property itself be located in another school district within the same county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

PMcG:irk

JOHN M. DALTON
Attorney General

SHERIFFS:
FEES:
THIRD CLASS COUNTIES:

The sheriff of a third class county is not required to make a verified report to the county court of his fees received in civil cases.



March 12, 1954

Honorable Robert A. Dempster
Prosecuting Attorney of
Scott County
Sikeston, Missouri

Dear Sir:

We render herewith our opinion based upon your request of February 17, 1954, which request reads as follows:

"I would appreciate it if you would give me your opinion of the following question: Is the Sheriff required to make an itemized statement each month to the County Court pertaining to civil fees collected and retained by him, as well as those uncollected? Scott County is a third class county."

We look first at Section 11 of Article VI of the 1945 Missouri Constitution, to determine whether it requires the sheriff of a third class county to make a verified report of his civil fees. That section reads thus:

"Except in counties which frame, adopt and amend a charter for their own government, the compensation of all county officers shall be prescribed by law uniform in operation in each class of counties. Every such officer shall file a sworn statement in detail, of fees collected and salaries paid to his necessary deputies or assistants, as provided by law."

(Emphasis ours.)

Honorable Robert A. Dempster

If it is self-executing, then by its terms it would require such a report. The rules respecting the interpretation of a constitutional provision, with reference to whether it is self-executing, is thus stated in 16 C.J.S., Constitutional Law, page 100:

"Constitutional provisions are not self-executing if they merely indicate a line of policy or principles, without supplying the means by which such policy or principles are to be carried into effect, or if the language of the constitution is directed to the legislature, or it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect.
* * *

Tested by these rules, the foregoing constitutional provision is not self-executing. We must look then for supplemental legislation to determine whether the sheriff is required to make a verified report of his civil fees to the county court.

If such report is required, it is required by Section 50.370, RSMo 1949, reading as follows:

"In all counties of classes three and four, every county officer who receives any fees or other remuneration for official services which is payable to the county, except recorders of deeds whose offices are separate from that of circuit clerks, shall at the end of each month file a verified report with the county court of his county showing all fees charged and accruing to his office and the act or service for which each such fee was charged, together with the names of persons paying or liable for same. Upon the filing of such report, each said county officer shall forthwith pay over to the county treasurer all fees and other moneys collected by him which belong to the county and shall take two receipts therefor, one of which shall be filed with the county court and the other shall be kept on file in his office. Every such officer shall be liable personally and on

Honorable Robert A. Dempster

his official bond for all fees collected by him and not accounted for and paid into the county treasury as herein provided."

Are the sheriff's fees "fees or other remuneration for official services which is payable to the county" within the meaning of this section? We think not, for all fees received by sheriffs of counties of the third class are permitted to be retained by the sheriff, by the provisions of Section 57.410 RSMo 1949. That section reads in part as follows:

"* * *The sheriff may retain all fees collected by him in civil matters."

Being required to report only those fees "payable to the county," the sheriff of a third class county is not required to report fees received in civil cases. This applies both to civil fees collected and those "charged and accruing".

CONCLUSION

The sheriff of a third class county is not required to make a verified report to the county court of his fees received in civil cases, nor those civil fees accrued and uncollected.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Very truly yours,

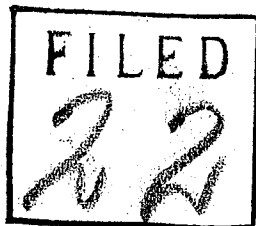
JOHN M. DALTON
Attorney General

WDK:hr

ELECTIONS:
VACANCY:
COUNTY POLITICAL
COMMITTEE:

When a vacancy by reason of death or withdrawal in the candidates for election for township committeeman or committeewoman occurs after the last day for filing for such position and before the day of election, the county political committee is not authorized to fill such vacancy.

July 19, 1954



Honorable Robert A. Dempster
Prosecuting Attorney
Scott County
Sikeston, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"I have been requested to obtain an opinion from your office on the following matter.

"In the case of a person filing declaration of candidacy for township committeeman under Section 120.340 for election to such committee post at the August Primary election, and who dies prior to said Primary, can the political committee of his party nominate or certify to the county clerk the name of some person, to replace the name of the deceased person, and have same printed on the August Primary Ballot for election along with other committee members.

"Since members of the county political committees are elected at the Primary and the instance referred to is not a vacancy in a nominat
ination, we desire to know if the political committee has authority to replace the name of the deceased person and the county clerk the authority to print the name of such replacement on the regular ballots for the Primary Election.

"Due to the shortness of time remaining for the printing of the official ballots, an early response will be appreciated."

After a careful examination of the laws of Missouri in this matter, we are of the opinion that, in the circumstances set forth

Honorable Robert A. Dempster

by you, the county party committee is not authorized to fill the vacancy which exists. This matter of filling a vacancy by act of a county party committee is set forth in Section 120.550 RSMo., Cum. Supp. 1953, which reads:

"Party committee to make nominations, when.-

1. The party committee of the county, district or state, as the case may be, shall have authority to make nominations in the following cases:

"(1) When a vacancy in the candidates for nomination as a party candidate for election to any of-
office shall occur by reason of death or resigna-
tion after the last day in which a person may file
as a candidate for nomination.

"(2) When any person nominated as the party can-
didate for any office shall die or resign before
election.

"(3) When a vacancy in office which is to be filled
for the unexpired term at the following general elec-
tion, shall occur after the last day in which a per-
son may file as a candidate for nomination.

"2. Nominations to fill such vacancies shall be
filed, as the case may be, either with the secre-
tary of state not later than fifteen days before
the day fixed by law for the election of the per-
son in nomination or with the election authority
not later than ten days before such election.

"3. No name shall be allowed on the ballot until
the required fee has been paid. (A.L. 1953 S.B.272)."

We do not believe, however, that the above section is appli-
cable to your situation, because it refers only to filling a vacancy
for the nomination to an office, whereas township committeemen and
committeewomen who are voted on at the August primary are not nomi-
nated but are elected at the August primary, which, so far as they
are concerned, is an election.

We would point out that committeemen and committeewomen may
be elected according to the provisions of Section 120.770 RSMo
1949, which reads:

Honorable Robert A. Dempster

"At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the case may be, for committeemen for such township, or voting district, and the man and the woman receiving the highest number of votes in such township, or election district, shall be the members of the party committee of the county of which such voting precinct or district is a part. Any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman by complying with the provisions of section 120.340 and, in all counties in this state now or hereafter containing a city of the first class, by also paying the sum of five dollars to the treasurer of the county committee of the party on whose ticket he or she seeks election."

We would further point out that if no names are written in, as is above provided, that after the primary the vacancy may be filled by the county political committee according to the provisions of Section 120.787, RSMo. Cum. Supp. 1953, which reads:

"Vacancies on county committee, filled, how.- Whenever any vacancy shall occur on the county central committee of any political party, a majority of the committee shall have power to fill such vacancy by electing any qualified voter of such political party who resides in the township or voting district to be represented."

CONCLUSION

It is the opinion of this department that when a vacancy by reason of death or withdrawal in the candidates for election for township committeeman or committeewoman occurs after the last

Honorable Robert A. Dempster

day for filing for such position, and before the day of election, that the county political committee is not authorized to fill such vacancy.

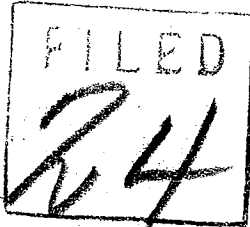
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

APPROPRIATIONS: Purposes for which appropriation of one million dollars made in Section 5.150, Appropriation Laws 1953-55 may be disbursed.



January 12, 1954

Honorable Phil M. Donnelly
Governor of Missouri
Executive Office
Jefferson City, Missouri

Dear Governor Donnelly:

Reference is made to your request for an official opinion of this department, based upon a letter received by you, the pertinent part of which reads as follows:

"At our conference this morning relative to the building program for the Missouri State School the question arose as to how the \$1,000,000.00 appropriation could be used in a building program.

"We submit the following questions which in our opinion should be submitted to the Attorney General for his clarification and official opinion.

"1. Can any part of the \$1,000,000.00 appropriated to the Missouri State School for the 'erection of a building or buildings suitable for housing 500 additional patients and equipment for such building' be used for any of the following necessary facilities:

- "(a) Construction of sewage disposal plant
- "(b) Water, gas and electrical service extension and connections within the grounds

Honorable Phil M. Donnelly

- "(c) Grading and site improvements, including landscaping, immediate adjacent to the building or buildings
- "(d) Construction of roadway, parking areas and sidewalks
- "(e) Remodelling and rehabilitation of existing buildings to be used in conjunction with any new buildings to be erected out of said appropriation
- "(f) In the event two or more buildings were erected could equipment be purchased out of this appropriation for all of said buildings.

The appropriation referred to is found as Section 5.150, Appropriation Laws, 1953-1955, and insofar as is pertinent to the matter under consideration reads as follows:

"Section 5.150. Missouri State School (Marshall and Carrollton).--There is hereby appropriated out of the state treasury, chargeable to the funds herein designated, for the use of the Missouri State School, for the payment of salaries and wages of the officers and employees; for the original purchase of property; for the repair and replacement of property; and for the operating and other expenses; for the period beginning July 1, 1953 and ending June 30, 1955.

"For the Missouri State School, payable from General Revenue Fund, as follows:

Personal Service:

Salaries of the superintendent, psychiatrists, psychologists, social workers, assistant physicians, dentists, steward, and other employees \$1,200,000.00

Additions:

Erection of a building or buildings suitable for housing 500 additional patients and equipment for such building 1,000,000.00

Repairs and Replacements:

Honorable Phil M. Donnelly

Labor, materials and supplies for repairing buildings, building equipment, furniture, office and operative equipment and structures other than buildings, and other necessary repairs and replacements 80,000.00."

As being appropriate to determining expenditures which may legally be made under this appropriation, we direct your attention to Section 21.260, RSMo 1949, reading as follows:

"Appropriations for the operation and maintenance of departments shall be separately itemized, and separate appropriations shall be made for each item of extraordinary operation and maintenance expenditure and for each major capital expenditure. Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

We now group the questions proposed under Subparagraphs (a), (b), (c), (d) for consideration, inasmuch as it is our belief that the same general rules are applicable to the determination of the propriety of these expenditures.

It is noted in the letter of inquiry that all of the matters referred to in these subparagraphs, together with the other two, are said to be "necessary facilities." This, of course, presents a factual problem and one which we are unable to consider definitely in the absence of detailed plans and specifications of the proposed structure or structures. It is true, as has been held in *State v. Weatherby*, 168 S.W. (2d) 1048, that appropriation acts must be strictly construed, yet I think it is equally well-settled law that such acts must also be construed to effectuate the intent of the General Assembly in making the appropriation. We are here confronted with the problem of determining in a general way what improvements may be properly included within the purview of the phraseology used in the appropriation act of an appropriation for "erection of a building or buildings suitable for housing 500 additional patients and equipment for such building."

It is common knowledge that as the term "building" is used, particularly in statutes and appropriation acts, something more than merely four walls and a roof is contemplated.

Honorable Phil M. Donnelly

In addition to such a bare structure, adequate sanitary facilities, utility supply lines, landscaping and beautification of adjoining grounds, and vehicular and pedestrian traffic roadways may very well be contemplated. We think that in each instance the relationship of each of such items to the completed structure as a whole must be given due consideration. Therefore, it is our thought that the various facilities enumerated under the subparagraphs now under consideration, if shown to be a part of an integrated plan for the proposed new building, and if further found to be reasonably necessary for the efficient use of the structure for the purpose intended, are expenditures which may lawfully be made under the appropriation for the "erection of a building."

We think in this regard the provisions of Section 202.600, RSMo 1949, may be of some value in determining the validity of each of such proposed expenditures.

This section reads as follows:

"Object of school.--The objects of such school shall be to secure the humane, curative, scientific and economical treatment and care of the feeble-minded and epileptics, exclusive of dangerous insane epileptics, to fulfill which design there shall be provided, among other things, a tract of fertile and productive land in a healthful situation, with an abundant supply of wholesome water, sufficient means of drainage and disposal of sewerage, and sanitary conditions; and there shall be furnished among other necessary structures, cottages for dormitory and domiciliary uses, buildings for an infirmary, a schoolhouse and a chapel, workshops for the proper teaching and productive prosecution of trades and industries; all of which structures shall be substantial and attractive, but plain and moderate in cost, and arranged on the colony or village plan."

You will note that under the provisions of the Section quoted the statutory duty is specifically enjoined upon the Division of Mental Diseases to provide adequate supplies of water and to provide suitable sewage and disposal facilities. Furthermore, under the powers granted the Division of Mental Diseases in the same statute it could well be that as finally built, a plan for a group of buildings might be adopted. Certainly, should this be done, means for the passage of vehicles and pedestrians from one structure to another would be necessary for the efficient usage of the buildings.

Honorable Phil M. Donnelly

With respect to the question proposed under Subparagraph (e) it is our belief that no part of the appropriation may be used for the purposes mentioned in the letter of inquiry. Not only is the "remodelling and rehabilitation of existing buildings" something which is separate and distinct from the "erection of a building," but the General Assembly has, in the appropriation bill under the further provisions quoted, appropriated the sum of \$80,000.00 for the purpose, which money is to be used for operations of this type.

With respect to the question proposed under Subparagraph (f) of the letter of inquiry it is our belief that the very language of the appropriation act, as quoted supra, authorizes the usage of such portion of the one million dollars' appropriation as may be necessary for equipping such structures as may be built from the money therein provided.

The General Assembly has specifically authorized the erection of "building or buildings" and having further provided for equipping such new structures, it is our thought that the money may be so used whether one or more buildings be erected.

CONCLUSION

In the premises, we are of the opinion that the appropriation of one million dollars made under Section 5.150, Appropriation Laws 1953-55, may be used for the following purposes, or any one or more of them, if, and only if, such proposed expenditure is a part of an integrated plan for the facility and reasonably necessary for the efficient use of the completed structure;

- (1) The construction of a sewage disposal plant;
- (2) The extension of necessary utility facilities;
- (3) Site improvements, including landscaping immediately adjacent to the new building;
- (4) The construction of roadways, parking areas and sidewalks; and,
- (5) Equipment for any building or buildings constructed out of the appropriation.

Honorable Phil M. Donnelly

It is the further opinion of this office that no part of said appropriation of one million dollars may be used for the remodelling and rehabilitation of existing buildings or other structures.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

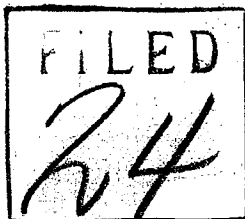
Yours very truly,

JOHN M. DALTON
Attorney General

WFB:vlw

CIVIL DEFENSE:

A county may properly expend funds for the salary and mileage of a civil defense director; it would be improper to employ civil defense director and have him designated as a deputy sheriff although he performs none of the civil or criminal functions of the deputy sheriff.



February 1, 1954

Honorable John E. Downs
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"Buchanan County, a county of the second class, is desirous of employing an individual to act as a director of County Civil Defense. In this connection I have two questions for your determination:

"1. Can the County properly expend funds for the salary and mileage for a Civil Defense director?

"2. Is it proper to employ such an individual and carry him as a Deputy Sheriff and paid as such even though this individual performs no functions criminal or civil and is not under the direction and control of the Sheriff, but merely carried budgetwise as a Deputy?"

The Civil Defense Law of Missouri is found in Senate Bill #406, enacted by the 67th General Assembly, which became effective August 29, 1953. This law is a reenactment of the Civil Defense Law enacted in 1951. Senate Bill No. 406 is now Chapter 44, V.A.M.S., Pocket Part.

In this law the term "political subdivision" is stated to mean "any county or city, town, village or any fire district created by law." And the term "local organization for civil defense" means "any organization established under this law by any county or any city, town or village to perform local civil defense functions."

Honorable John E. Downs

Section 44.020, of the Civil Defense Law states:

"1. There is hereby created within the executive branch of the state government a 'Division of Civil Defense' (hereinafter called the 'Civil Defense Agency') and a 'Director of Civil Defense' (hereinafter called the 'Director') who shall be the head thereof. The director shall be appointed by the governor with the advice and consent of the senate. He shall not hold any other state office. He shall hold office during the pleasure of the governor and shall receive a salary of not to exceed six thousand five hundred dollars per annum, to be fixed by the governor, payable monthly out of the state treasury.

"2. The director may employ and fix the compensation of such technical, clerical, stenographic and other personnel (when they are to be compensated) and may make such expenditures within the appropriation therefor, as may be necessary to carry out the purposes of this law.

"3. The director, subject to the direction and control of the governor, shall be the executive head of the civil defense agency and shall be responsible to the governor for carrying out the program for civil defense of this state. He shall coordinate the activities of all organizations for civil defense within the state, and shall maintain liaison with and cooperate with civil defense agencies and organizations of other states and of the federal government, and shall have such additional authority, duties and responsibilities authorized by this law as may be prescribed by the governor."

Section 44.080 of the Civil Defense Law states:

"1. Each political subdivision of this state may establish a local organization for civil defense in accordance with the state civil defense plan and program, with a director appointed by the executive officer of the political subdivision and who shall have direct responsibility for the organization, administration and operation of such local organization for civil defense, subject to the direction and control of such executive officer or governing body. Each local organization for civil defense shall be responsible for the performance of civil defense functions within the territorial limits of the political subdivision within which it is organized, and may conduct such functions outside of such

territorial limits as may be required pursuant to the provisions of this law.

"2. In carrying out the provisions of this law each political subdivision may:

"(1) Appropriate and expend funds, make contracts, obtain and distribute equipment, materials, and supplies for civil defense purposes, provide for the health and safety of persons and property, including emergency assistance to victims of any enemy attack; and to direct and coordinate the development of civil defense, plans and programs in accordance with the policies and plans of the federal and state civil defense agencies;

"(2) Appoint, provide, without compensation, or remove air raid wardens, rescue teams, auxiliary fire and police personnel and other civil defense teams, units or personnel;

"(3) In the event of enemy attack, waive any time consuming procedures and formalities otherwise required by statute pertaining to the advertisement for bids for the performance of public work or entering into contracts."

It will be noted that Section 44.080 states that each political subdivision of the state may establish a local organization for civil defense in accordance with the state civil defense plan. We noted above that a county is a political subdivision of the state. Section 44.020, supra, states that the governor may appoint a state director who shall receive a salary not to exceed \$6500.00 per year. It would seem that for a county to appoint a county director, at a salary, would be in "accordance" with the state plan. Furthermore, subparagraph (1) of paragraph (2) of Section 44.080, supra, gives the political subdivision power, in carrying out the provisions of the law, to "appropriate and expend funds. . . ."

It would appear that this could very well include the salary of a director of civil defense.

Furthermore, subparagraph (2) of paragraph (2) of Section 44.080, supra, states that "air raid warden, rescue teams, auxiliary fire and police personnel, and other civil defense terms, units or personnel shall serve without compensation." We do not believe that the words "units or personnel" used above were meant to include the director since he is separately mentioned in paragraph (1) above.

Honorable John E. Downs

We are aware of the well-established rule of law in Missouri that before anyone can be paid public funds he must be able to point to a statute authorizing such payment. We believe that Section 44.080, supra, is such authority.

Adequate civil defense is a matter of vital importance to our people. It would seem that to establish and oversee such a program in a county of the size of Buchanan County would be a full time job for one person. It could not be thought that the Legislature contemplated that a Director could be secured to serve without compensation. We, therefore, believe that a county may expend funds for salary and mileage for a civil defense director.

Your second question is: "Is it proper to employ such an individual and carry him as a deputy sheriff and paid as such even though this individual performs no functions criminal or civil and is not under the direction and control of the sheriff, but merely carried budgetwise as a deputy "while in reality acting as civil defense director."

We do not believe that this would be proper. Section 57.270 RSMo 1949, states:

"Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

This clearly contemplates that a deputy sheriff shall assist the sheriff in the performance of his civil and criminal functions. To appoint a deputy and then not have him assist the sheriff in performing his duties would be a fraud upon the county.

CONCLUSION

It is the opinion of this department that a county may properly expend funds for the salary and mileage of a civil defense director; also that it would be improper to employ a civil defense director and have him designated as a deputy sheriff although he performs some of the civil or criminal functions of the deputy sheriff.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Hugh P. Williamson.

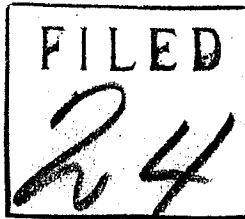
Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

TAXATION:
CORPORATIONS:

Corporation organized under Chapter 351, RSMo 1949, engaged in operating telephone exchanges subject to original assessment by Missouri State Tax Commission.



April 26, 1954

Honorable J. Morgan Donelson
Prosecuting Attorney
Mercer County
Princeton, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"Grand River Mutual Telephone Corporation, being a mutual type of company financed under the Telephone Act of the Rural Electrification Administration, has recently acquired numerous telephone properties in this and surrounding counties. The telephone properties acquired have in the past been assessed by the State Tax Commission.

"Grand River Mutual Telephone Corporation contend that they should be assessed by the local assessor, which in Mercer County, being under township organization, would be the township assessor in each township wherein their lines are located. They contend that they are of exactly the same status as are the REA electric cooperatives of Missouri and that since sole ownership is vested in the telephone subscribers, each subscriber being limited but compelled to own one share of common stock of the telephone corporation, that their tax assessment should be on the same basis and they

Honorable J. Morgan Donelson

should not be assessed by the State Tax Commission. I find no precedent covering telephone companies and therefore, would appreciate if you would render an opinion advising as to whether or not the local assessor should proceed with this assessment or should the assessment be made by the State Tax Commission, as was the practice of the predecessor companies.

"Your promptness in furnishing this opinion will be appreciated."

You have further advised us in a subsequent communication that the corporation referred to in your letter of inquiry was organized under the general and business corporation code, found Chapter 351, RSMo 1949. We are further advised by the Public Service Commission of the State of Missouri that the corporation referred to in your letter of inquiry is operating under a certificate of convenience and necessity issued by that department.

The liability for taxation of the property of the corporation being conceded we will not stop to point out the constitutional and statutory provisions imposing such liability. We believe that the answer to your inquiry is found in Subsection 1 of Section 138.420, RSMo 1949, reading as follows:

"1. The commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms." (Emphasis ours.)

It is noted in your request for this opinion that the contention is being made by the corporation that it should occupy the same status as rural electrification cooperatives organized under the provisions of Chapter 394, RSMo 1949. However, in view of the information given to us that the corporation about which you have inquired is one organized

Honorable J. Morgan Donelson

under the general and business corporation code and is engaged in business as a public utility, it is apparent that a clear distinction exists between such a corporation and a rural electric cooperative.

CONCLUSION

In the premises we are of the opinion that a corporation organized under the general and business corporation code of the State of Missouri and furnishing telephone service for hire to the public generally is liable for assessment by the State Tax Commission under the provisions of Section 138.420, RSMo 1949.

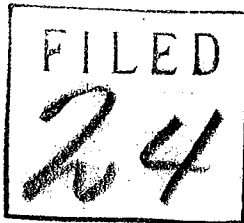
The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB:vlw

COUNTY COURTS:
SECOND CLASS COUNTIES:
PURCHASES:



The county court of Buchanan county may purchase directly from Platte county, without asking for bids, an iron bridge to be used as a part of the road building program in Buchanan county. The county court of Buchanan county may, without asking for bids, purchase surplus government equipment for use in its road building.

May 20, 1954

Honorable John E. Downs
Prosecuting Attorney
Buchanan County
Courthouse
St. Joseph, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"This office would like your advice and opinion on the following problem.

"The County Court of Buchanan County has the opportunity to purchase from Platte County, a bridge for the sum of \$1000.00. The County Court feels that this is a reasonable price and that we can use the bridge.

"The problem is this: Is there any way in which this County Court can lawfully purchase the bridge direct from Platte County or must they ask for bids on a bridge with specifications like the bridge Platte County has to sell?

"Furthermore, on occasions there are opportunities to purchase government surplus equipment which the County could use in its road building program. This equipment could be purchased at a saving, yet the Federal Government can not submit bids. Is there any way in which this County can buy such equipment direct?"

In regard to the authority of the county court to acquire property for the county, and to dispose of property belonging to the county, we direct attention to Section 49.270 RSMo 1949, which reads:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and auth-

Honorable John E. Downs

ority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

This is a very broad and inclusive grant of power, and under it, without modification, the county court certainly could purchase the bridge from Platte county and the government surplus equipment for road building, without advertising for bids.

Section 50.760 RSMo 1949, applies only to counties of the second class, which is the classification of Buchanan county, and relates to purchases by such a county. That section reads:

"It shall be the duty of the judges of the county court in all counties of the second class, on or before the first day of February of each year, to determine the kind and quantity of supplies, including any advertising or printing which the county may be required to do, required by law to be paid for out of the county funds, that will be necessary for the use of the several officers of such county during the current year, and to advertise for sealed bids and contract with the lowest and best bidder for such supplies. Before letting any such contract or contracts the court shall cause notice that it will receive sealed bids for such supplies, to be given by advertisement in some daily newspaper of general circulation published in the county, such notice to be published on Thursday of each week for three consecutive weeks, the last insertion of which shall not be less than ten days before the date in said advertisement fixed for the letting of such contract or contracts, which shall be let on the first Monday in March, or on such other day and date as the court may fix between the first Monday of March and the first Saturday after the second Monday in March next following the publication of such notice; provided, that if by the nature or quantity of any article or thing needed for any county officer in any county of this state to which sections 50.760 to 50.790 apply, the same may not be included in such contract at a saving to such county, then such article or thing may be purchased for such officer upon an order of the county court first being made and entered as provided in sections 50.760 to 50.790; and provided further, that if

Honorable John E. Downs

any supplies not included in such contract be required by any such officer or if the supplies included in such contract be exhausted then such article or thing may be purchased for such officer upon order of the county court first being made and entered of record as provided in sections 50.760 to 50.790."

It will be noted by the underlined portion of Section 50.760, supra, that as it applies to supplies for each county office, the bid system may, at the discretion of the county court, be set aside.

We also believe that the bridge and the government surplus equipment in question would be by their "nature and quantity" objects which could not be included in a contract resulting from a bid, at any saving to the county. We believe, too, that the bridge and government surplus equipment would come under the heading "supplies not included in such contract", and supplies which were included in a contract, but which became exhausted before the expiration of the time for which they were purchased, in both of which instances they may be purchased simply upon an order of the county court.

It is our opinion that Section 50.760, supra, gives to the county court of a second class county the authority to purchase direct the articles enumerated by you.

Section 70.100 RSMo 1949, reads:

"That any municipality or political subdivision of this state may enter into contracts with the United States of America, or with any department or agency thereof, for the purpose of accepting gifts and for the purchase, sale, exchange, lease, or transfer of any equipment, supplies, materials, or other property for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the federal government, or the department or agency thereof, deems proper, without regard to the provisions of law or any municipal charter or ordinance which may require, among other things, the following:

"(1) Posting of notices or public advertising for bids or of expenditures;

"(2) Inviting or receiving of competitive bids;

"(3) The making of purchases from the lowest and best bidder;

"(4) The delivery of purchases before payment."

Honorable John E. Downs

The above section obviously fully covers the question raised by you regarding the purchase by the county of surplus government equipment, and clearly gives the county permission to do so directly.

CONCLUSION

It is the opinion of this department that the county court of Buchanan county may purchase directly from Platte County, without asking for bids, an iron bridge to be used as a part of a public building program in Buchanan county.

It is our further opinion that the county court of Buchanan county may, without asking for bids, purchase surplus government equipment for use in its road building program.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

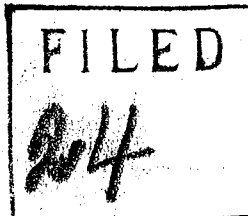
Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

DOUBLE JEOPARDY:
FORMER JEOPARDY:
LIQUOR SUPERVISOR:
CRIMINAL LAW:

A hearing by the Supervisor of Liquor Control to suspend or revoke a liquor license does not place the licensee in jeopardy of being deprived of his life or liberty, within the meaning of Article I, Section 19, Constitution of Missouri, 1945, and Section 556.240 RSMo 1949, and, therefore, said hearing is not a bar to subsequent criminal prosecution for the same act in violation of the liquor control laws.



June 8, 1954

Honorable Edward L. Dowd
Circuit Attorney
Municipal Courts Building
St. Louis, Missouri

Dear Sir:

By your letter of May 21, 1954, you requested an official opinion as follows:

"The St. Louis press yesterday published a report indicating that a charge of illegal possession of liquor against a was dismissed by St. Louis County Magistrate ."

"The dismissal of the prosecution according to the press reports was based on Magistrate finding that because the defendant's 5% beer license had been suspended after State Liquor Control agents found spirituous liquors on the premises, that the imposition of the penalties provided by law for such illegal possession would constitute 'double jeopardy'. Apparently the Magistrate's theory in dismissing the case was that the defendant had already been punished by the suspension of the license."

"It has always been the law to my knowledge that a liquor license is a privilege granted by the State in pursuance of its regulatory powers of the distribution and sale of intoxicating liquors."

Honorable Edward L. Dowd

"It would appear therefore that the suspension or revocation of a liquor license is not 'punishment' at all but rather is a mere withdrawal of a privilege the State was not obligated to grant in the first instance.

"This decision conflicts directly with the State Statutes and Supreme Court decisions. If it is to be the law, then the enforcement of liquor violations will become a farce. Yearly, the St. Louis Circuit Court Grand Jury indicts a large number of people under the same circumstances, and informations are issued by the Circuit Attorney's office based on exactly the same evidence that result in prosecution and conviction. I believe there is a serious conflict between the Supreme Court decisions and the Magistrate's ruling. Therefore, I am requesting an official opinion by your office as to whether or not our understanding of the liquor laws is correct, and particularly whether the grounds stated by the Magistrate in the dismissal ordered are supported by law. Because of the fact we have so many liquor cases now pending prosecution, I would appreciate an early reply."

The criminal prosecution of which you speak was apparently based on Section 311.270 RSMo 1949, paragraph 1, which reads as follows:

"1. It shall be unlawful for any person, holding a license for the sale of malt liquor only, to possess, consume, store, sell or offer for sale, give away or otherwise dispose of, upon or about the premises mentioned in said license, or, upon or about said premises to suffer or permit any person to possess, consume, store, sell or offer for sale, give away or otherwise dispose of, any intoxicating liquor of any kind whatsoever other than malt liquor brewed or manufactured by the method, in the manner, and of the ingredients, required by the laws of this state.

Honorable Edward L. Dowd

Whoever shall violate any provision of this section shall be guilty of a misdemeanor, and upon conviction thereof by any court of competent jurisdiction shall be punished as in this chapter provided as to misdemeanors. Upon such conviction becoming final, the license of the person so convicted shall forthwith, and without other or further action, order or proceeding, be deemed to have been revoked, and shall by the licensee be forthwith surrendered to the supervisor and canceled."

The "double jeopardy" provision in the Constitution of Missouri, 1945, is Article I, Section 19.

"That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; but if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court; and if judgment be arrested after a verdict of guilty on a defective indictment or information, or if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law."
(Emphasis ours)

Section 556.240 RSMo 1949 makes the following provision:

"When the defendant shall be acquitted or convicted upon any indictment, he shall not thereafter be tried or convicted of a different degree of the same offense, nor for an attempt to commit the offense charged in the indictment, or any degree thereof, or any offense necessarily included therein, provided he could have been legally convicted of such degree or offense, or attempt to commit the same, under the first indictment."

The above provisions apply only to criminal prosecutions. 2206.J.S., Criminal Law, paragraph 240, pp.372-373. The

Honorable Edward L. Dowd

constitutional provision was construed by the Supreme Court of Missouri in State v. Spear, 6 Mo. 644, 645, as follows:

"* * *By this provision I understand, that in all criminal prosecutions where a conviction would subject him to capital punishment, or would render him liable to be restrained from his personal liberty, an acquittal by a jury is a complete bar to any subsequent trial. * * *"

The "double jeopardy" provision does not apply to civil actions. State v. Muir, 164 Mo. 610, 65 S.W.2 85. Thus, in Donnelly v. Steele, 180 Fed.2d 1019, it was said that the petitioner was not placed in jeopardy twice for the same offense, because he had been sued for damages by the widow of the man he killed, and prosecuted and imprisoned for the same murder. Nor does the revocation of a liquor license bar a criminal prosecution for the same offense. 48 C.J.S., Intoxicating Liquors, par. 180, pp. 308, 309. Thus, in State v. Barnett, 111 Mo. App. 552, the St. Louis Court of Appeals made this statement concerning the revocation of a liquor license, and criminal prosecution, for the same act, l.c. 555, 556:

"County courts unquestionably have jurisdiction to revoke dramshop licenses in a proper case if the licensee has not kept an orderly house. R. S. 1899, sec. 3012. Therefore, the county court of Pemiscot county had jurisdiction of the subject-matter of the proceeding to revoke the license of Wm. H. Barnett. This proceeding was instituted on a properly verified information charging the defendant with keeping a disorderly house. To the argument that the county court revoked the license for the same offence acted on by the circuit court, and that the action of the county court was in a proceeding of which it had no jurisdiction, because a prior proceeding to forfeit on the same ground was pending in another court, our answer is that the proceedings in the two courts were entirely different. The cause pending in the circuit court was a criminal information charging Wm. H. Barnett with a district offence, to-wit: keeping a musical instrument in his saloon and permitting it to be played. The charge in

Honorable Edward L. Dowd

the county court was keeping a disorderly house. Those two charges were distinct and the county court had jurisdiction of one and the circuit court of the other. But if the county court sustained the charge of keeping a disorderly house on proof of the same facts for which Wm. H. Barnett was convicted of an offence in the circuit court, this does not render the forfeiture by the judgment of the former tribunal, on a finding by it that a disorderly house had been kept, a nullity in this independent prosecution. * * *

In Barnett vs. County Court, 111 Mo.App. 693, the same court made this statement as to the rights of a liquor licensee, l.c. 706:

"Our conclusion is that the county court in revoking the license of appellant, acted in an administrative and ministerial capacity as the agent of the State, exercising the police powers thereof to the end that the business otherwise unlawful, should not be conducted in a manner contrary to the permit theretofore by it granted and that the proceeding contemplated by section 3012 which was had in this case by the county court is in no sense judicial for the reason that no right of life, liberty or property was therein involved nor adjudicated and that there was therefore no case or cause pending in the county court as is contemplated by the statute granting appeal therefrom to the circuit court.* * *

The proceedings before the Supervisor of Liquor Control is not a criminal prosecution. There is no information or indictment as required by Article I, Section 17, Constitution of Missouri, 1945, nor is said Supervisor vested with judicial power by Article V, Section 1, Constitution of Missouri, 1945. The Supervisor is not authorized to inflict punishment, nor is he authorized to deprive a person of his life or liberty, but may only revoke or suspend a temporary permit granted by the state. Therefore, the constitutional and statutory prohibition against double jeopardy is not applicable to a hearing before said Supervisor to suspend or revoke a license.

Honorable Edward L. Dowd

CONCLUSION

It is, therefore, the opinion of this office that a hearing by the Supervisor of Liquor Control to suspend or revoke a liquor license does not place the licensee in jeopardy of being deprived of his life or liberty, within the meaning of Article I, Section 19, Constitution of Missouri, 1945, and Section 556.240 RSMo 1949, and, therefore, said hearing is not a bar to subsequent criminal prosecution for the same act in violation of the liquor control laws.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:lvd

SHERIFFS: Sheriff in second class county should charge ten cents per mile for services in criminal and civil proceedings.



July 14, 1954

Honorable John E. Downs
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request is as follows:

"This office would like your advice and opinion on the following matter:

"The sheriff of this county would like to know whether he should charge 10¢ or 7¢ per mile for each mile traveled serving any venue, summons, writs or other orders of the court when served more than five miles from where the court is held.

"We note that Section 57.280 entitled 'Fees of Sheriffs' states that he may charge 10¢ for such service and Section 57.300 states that a sheriff may charge 10¢ in criminal cases but Section 57.350 entitled 'Mileage Rates Allowed Class 2 Counties' states that the sheriff and his deputies shall be reimbursed out of the county treasury at the rate of 7¢ per mile for each mile actually traveled in the performance of their official duties.

"We would like to know what is proper for the sheriff of this county to charge, 10¢ or 7¢, and if he is allowed to charge 10¢, what happens to the other 3¢ which he is not paid by the County Treasurer?"

Honorable John E. Downs

Section 57.280, RSMo 1949, provides, in part, as follows:

"Fees of sheriffs shall be allowed for their services as follows:

"For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip10"

Section 57.300, RSMo 1949, provides:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held; provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

Section 57.350, MoRS, 1953 Supp., provides:

"The sheriff and his deputies shall be reimbursed out of the county treasury, at the rate of seven cents per mile for each mile actually and necessarily traveled, in this state, in the performance of their official duties. When mileage is allowed, it shall be computed from the place where court is usually held, and when court is usually held at one or more places, such mileage shall be computed from the place from which the sheriff or deputy sheriff travels in performing any service. When two or more persons who are summoned, subpoenaed, or served with any

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process, writ, or notice, in the same action, live in the same general direction, mileage shall be allowed only for summoning, subpoenaing or serving of the most remote. At the end of each month, the sheriff and each deputy shall file with the county court an accurate and itemized statement, in writing, showing in detail the miles traveled by such officer, the date of each trip, the nature of the business engaged in during each trip, and the places to and from which he has traveled. Such statement shall be signed by the officer making claim for reimbursement, verified by his affidavit, and filed by him with the county court. Whenever claim for reimbursement is made by a deputy, his statement shall also be approved in writing by the sheriff. The county court shall examine every claim filed for reimbursement, and if found correct, the county shall pay to the officer entitled thereto, the amount found due as mileage."

Section 57.370, RSMo 1949, provides:

"It shall be the duty of the sheriff to charge, collect and receive, upon behalf of the county, every fee, penalty, charge, commission, and other money that accrue to him or his office in connection with criminal matters, and all such fees, penalties, charges, commissions, and money collected by him, shall, at the end of each month, be paid by him to the county treasurer, as hereafter provided."

Section 57.380, RSMo 1949, provides:

"It also shall be the duty of the sheriff to charge, collect and receive, on behalf of the county, every fee, penalty, charge, commission and other money that shall accrue to him or his office for official services rendered in civil matters, by virtue of any statute of this state, and all such fees, penalties, charges, commissions, and other money collected by him, shall at the end of each month be paid by him to the county treasurer, as hereafter provided, less that amount which he is herein authorized to retain. He shall not be entitled

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to collect the per diem allowed to the sheriff as a member of the board of equalization and board of appeals, as provided in section 138.020." (Emphasis ours.)

Section 57.340, MoRS, 1953 Supp., provides that the sheriff in second class counties of less than 100,000 population may retain from his civil fees an amount not to exceed \$3,900 for any year of his term.

Considering the above statutes together, it appears to us that the fees provided by Sections 57.280 and 57.300, supra, for mileage are the fees which the person liable for the costs in the action must pay. In criminal matters, such fee must, in accordance with Section 57.370, supra, be turned in to the county treasurer. In civil matters, the sheriff is permitted to retain such fee up to the limit provided by Section 57.340, supra.

Section 57.350, MoRS, 1953 Supp., fixes the rate of reimbursement by the county to the sheriff for the mileage traveled by him in the performance of his official duties. This section does not in any way purport to fix the amount which should be charged by the sheriff to the person liable for the costs in the particular case.

CONCLUSION

Therefore, it is the opinion of this office that the sheriff of second class counties should charge his mileage in civil and criminal actions in accordance with Sections 57.280 and 57.300, RSMo 1949, respectively, at the rate of ten cents per mile, although the sheriff's reimbursement from the county is, in accordance with Section 57.350, MoRS, 1953 Supp., at the rate of seven cents per mile.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

CITIES: A member of the common council of the City of
CONTRACTS: St. Joseph may accept payment from the Social
PUBLIC POLICY: Welfare Board of Buchanan County for trans-
WELFARE BOARD: portation of a patient to a hospital at the
request of said board.



August 10, 1954

Honorable John E. Downs
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Attention: Mr. Frank D. Connett, Jr.

Dear Mr. Downs:

By letter dated July 13, 1954, you requested an
opinion of this office as follows:

"* * * The Department of Public Health
and Welfare operates on funds appro-
priated to it by the City of St. Joseph
and the County of Buchanan. One of the
members of the St. Joseph City Council,
John E. Rupp, is an operator of a funeral
home and ambulance service. At the re-
quest of The Department of Public Health
and Welfare, when they could find no one
else to do it, Mr. Rupp took a patient
to Mt. Vernon, Missouri. The charge for
this was \$70.00. Our problem is this -
may Mr. Rupp, being a member of the St.
Joseph City Council, accept payment for
this trip?"

In a subsequent letter you stated:

"The department involved in my letter of
July 13, is a social welfare board of
the County of Buchanan. It was formed
under what is now Section 205.770 R.S.
Missouri, 1949. Although it gets its
funds on which to operate from both
the city and the county, it does not
seem to be under the control of either."

Honorable John E. Downs:

According to the official manual, State of Missouri, 1953-54, St. Joseph is a city of the first class, and apparently does not have the alternative form of government. Turning, therefore, to Chapter 73, RSMo 1949, the following provision is found:

73.490. "If any city officer shall be directly or indirectly interested in any contract under the city, or any work done by the city, or in furnishing supplies for the city or any of its institutions, he shall be deemed guilty of a misdemeanor; and any appointive officer becoming so interested shall be dismissed from office immediately by the mayor; and upon the mayor becoming satisfied that any elective officer is so interested, he shall immediately suspend such officer and report the facts to the common council, whereupon the common council, as soon as practicable, shall be convened to hear and determine the same; and if, by a four-fifths vote of the common council, he be found to be so interested, he shall be immediately dismissed from such office. No officer shall hold two appointments under the city government at the same time."

Assuming a member of the common council to be a "city officer" within the meaning of the above section, it is necessary to determine whether the Social Welfare Board of Buchanan County is an institution of the city.

Section 205.770, RSMo 1949, which authorizes the establishment of the board reads as follows:

"1. In any county of the second class in this state there may be created and established by order of the county court of any such county a board which shall be styled 'The Social Welfare Board of the County of'

"2. All powers and duties connected with and incident to the betterment of social and physical causes of dependency, the relief and care of the indigent, and the care of sick dependents, with the exception

Honorable John E. Downs:

of the insane and those suffering with contagious, infectious and transmissible diseases, and excepting those persons who may be admitted to the county poorhouses of such counties, shall be exclusively invested in and exercised by said board.

"3. Said board shall have power to receive and expend donations for social welfare purposes and shall have exclusive control over the distribution and expenditure of any public funds set aside and appropriated by such counties and by any city located in any such county for the relief of the temporarily dependent. Said board shall have power to promote the general welfare of the poor within the limits of such counties by social and sanitary reforms, by industrial instruction, by the inculcation of habits of providence and self-dependence, and by the establishment and maintenance of any activities to these ends. Said board shall have power to sue and be sued, complain and defend in all courts, to assume the care of or take, by gift, grant, devise, bequest or otherwise, any money, real estate, personal property, right of property, or other valuable things, and may use, enjoy, control, sell or convey the same for charitable purposes, to have and to use a common seal and alter the same at pleasure.

"4. Said board may make bylaws for its own guidance, rules and regulations for the government of its agents, servants and employees, and for the distribution of the funds under its control."

Further powers are given the board by Section 205.780:

"Said board shall have the exclusive power to make all suitable provisions for the relief, maintenance and support of all indigent persons within said county and within any city in said county who may appropriate for the support of said board, and to make suitable provisions for the care and maintenance to the sick dependents and those who

Honorable John E. Downs:

are unable to support themselves; to enforce the laws of the state, the ordinances of such cities located within said county, in regard to the indigent, and to make such rules and regulations in the conduct of its business not inconsistent with the laws of the state of Missouri and the ordinances of such cities; to have exclusive control, care and management of all public hospitals owned or operated by said counties or said cities, except those for the care of the insane and those suffering with contagious, infectious and transmissible diseases; to recommend to the common council of said city the passage of such ordinances as said board may deem necessary for the welfare of the indigent of said city; to have the power to appoint competent physicians and surgeons, who shall hold their office at the pleasure of said board, at a salary to be fixed by said board, and said physicians and surgeons shall perform such duties as may be prescribed by said board, and shall render medical attendance to all those who may come within the provisions of this law; said board shall have the power and it shall be the duty of said board to employ and discharge all persons or officers in their judgment necessary to carry out the matters over which said board is given jurisdiction or control."

Provision for selection of the members of said board is made by Section 205.790:

"1. Said board shall be non partisan and nonsectarian in character, and the members and officers thereof shall receive no compensation as such.

"2. Said board shall consist of the mayor of such cities and the presiding judge of the county court of such counties, who shall be ex officio members thereof, and

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six other members, three of whom shall be appointed by the county court of such counties, who shall hold office, one for one year, one for two years and one for three years, whose terms of office shall be designated by such county court, three by the mayor and common council of such cities, who shall hold office, one for one year, one for two years and one for three years, whose terms of office shall be designated by the mayor.

"3. Whenever the term of office of any member so appointed expires, the appointment of his successor shall be for three years. All such appointments shall date from the first of June following their appointment.

"4. Vacancies from any causes shall be filled in like manner as original appointment. The mayor may, for misconduct or neglect of duty, remove any member appointed by him in the manner required for removal of officers of such cities. The county court may, by a majority vote, for misconduct or neglect of duty, remove any member appointed by them."

Examination of the above sections pertaining to the Social Welfare Board disclose that only the County Court can create the board, and that the only control which the city has over the board is the appointment of half of the board members, and the appropriation or withholding of city funds for use by the board. The city can neither create nor abolish the board, but can only determine whether it wishes to contribute funds for the operation of the board. The placing of the power of establishment and abolition of the board in the County Court clearly indicates that the board is not an institution of the city. Thus, Section 74.490, supra, is not applicable.

In addition to Section 74.490, however, the public policy of Missouri prohibits contracts between an official

Honorable John E. Downs:

board and one of its members. This policy was expressed by the Supreme Court in Githens vs. Butler County, 350 Mo. 295, 165 S.W. (2d) 650, 1.c. 652:

"* * * A stricter rule is laid down in regard to public corporations, and it is held that a member of an official board or legislative body is precluded from entering into a contract with that body.' 6 Williston, Contracts, Sec. 1735, p. 4895. The basis of this common law rule is that it is against public policy (State ex rel. Smith v. Bowman, 184 Mo. App. 549, 170 S.W. 700) for a public official to contract with himself. 'At common law and generally under statutory enactment, it is now established beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy and tainted with illegality; and this rule applies whether such officer acts alone on behalf of the municipality, or as a member of a board of (or) council. * * * The fact that the interest of the offending officer in the invalid contract is indirect and is very small is immaterial. * * * It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the operation of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract or in its performance. In general the disqualifying interest must be of a pecuniary or proprietary nature.' 2 Dillon, Municipal Corporations, Section 773; 46 C.J., Section 308; 22 R.C.L. Section 121; State ex rel. Streif v. White, Mo. App., 282 S.W. 147; Witmer v. Nichols, 320 Mo. 665, 8 S.W. 2d 63; Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. 2d 857."

The council member unquestionably has an interest in

Honorable John E. Downs:

the subject contract, but said member did not contract with his board. Instead the contract was with another independent board. A member of the common council of the City of St. Joseph has only a very remote control, if any, over the letting of contracts by the county Social Welfare Board. He merely has his one vote on the council to appoint one half of the members of the Social Welfare Board, and has one vote as to whether the city should appropriate funds for use by the board. He has no other control in the letting of contracts by said board. Since the power to let the contracts in question and the performance of the contract were not placed in the same hands, the council member was not faced with a conflict between his private interest and the interest of the public. Therefore, the contract was not void as being in conflict with the public policy in this isolated case, when the Welfare Board could find no one else to transport the patient. Our conclusion might be different if this type of contract were to be recurrent.

CONCLUSION.

In the premises, therefore, it is the opinion of this office that a member of the common council of the City of St. Joseph may accept payment from the Social Welfare Board of Buchanan County for transportation of a patient to a hospital at the request of said board.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

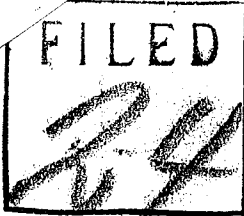
Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:lvd:irk

BOARD OF ELECTION COMMISSIONERS:
ELECTIONS:
HOLIDAYS:
VOTERS:
REGISTRATION:

Office of the Board of Election Commissioners for the City of St. Louis may be opened for registration of voters on Sept. 6, 1954, even though that day is a legal holiday. Registrations for an election to be held in the City of St. Louis on Sept. 30, 1954, must be closed at 5 o'clock on Sept. 6, 1954.



August 18, 1954

Board of Election Commissioners
for the City of St. Louis
208 South Twelfth Boulevard
St. Louis 2, Missouri

Attention: Honorable Michael J. Doherty,
Chairman.

Gentlemen:

By letter dated July 14, 1954, you requested an official opinion as follows:

"This Board is in receipt of notice from the City Register of the City of Saint Louis, calling for a Special Election, September 30, 1954.

"We call your attention to Section 118.240, R.S. Mo. 1949, which provides that registration shall close at 5 o'clock P.M. on the 24th day preceding the election. We find that the 24th day preceding the election is Labor Day, September 6th, a Legal Holiday.

"Will you please advise as to whether or not this office may be permitted, under the law, to stay open for such registration on September 6th, or as to whether or not it would be permissible to receive registration on Tuesday, September 7th?"

Section 118.240, RSMo 1949, reads as follows:

"Registration shall be conducted at the office of the board throughout the entire year, except as herein provided,

Board of Election Commissioners
for the City of St. Louis:

upon the usual business days and at the regular office hours and at additional hours in the discretion of the board. The board may also provide for and give notice of other places of registration, as in its judgment the best interests of the service require, which places shall be open for registration at such times as the board may direct. Registration for any election shall be closed at five o'clock p.m. on the twenty-fourth day preceding the election, except municipal elections, when it shall be closed at five o'clock p.m. on the forty-fifth day prior to April election, and no voter shall thereafter be registered prior to said election, except by order of the circuit court on appeal as provided in section 118.410. No voter who is duly registered in compliance with the provision of this chapter shall be required to register again so long as he continues to reside at the address from which he is registered, unless his registration be canceled, as provided for in this chapter."

Turning to your first question as to whether your office may be opened for the transaction of official business on September 6, 1954, it is found that said day is a legal holiday under Section 10.010, RSMo 1949.

"The following days, namely: The first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, any general primary election day, any general state election day, any thanksgiving day appointed by the President of the United States or by the governor of this state, and the twenty-fifth of December, are hereby

Board of Election Commissioners
for the City of St. Louis:

declared and established public holidays; and when any of such holidays falls upon Sunday, the Monday next following shall be considered such holiday."

However, the law as to whether business may be transacted on holidays is stated by the Supreme Court of Missouri in Bullock vs. Peoples Bank of Holcomb, 173 S.W. (2d) 753, l.c. 760, to be:

"* * * The fact that a day is made a holiday by statute does not mean business cannot be transacted on that day, except insofar as that statute or some other imposes such restriction. Cartwright v. Liberty Tel. Co., 205 Mo. 126, 131(1), 103 S.W. 982, 983(1), 12 L.R.A., N.S., 1125, 12 Ann. Cas. 249; Stewart v. Brown, 112 Mo. 171, 182, 20 S.W. 451, 453(3); State v. Green, 66 Mo. 631, 644(3); In re Green, 86 Mo. App. 216, 223."

Turning to the statutes it is found that Section 118.040, Paragraph 6, makes the following provision:

"6. The board shall maintain an office, which shall always be kept open during business hours of every day, Sundays and legal holidays (other than election days) excepted."

However, the above merely states when your office must be open, rather than limiting the times at which it may be open. In the absence of any other statute we conclude that your office may be opened for the transaction of official business on September 6, 1954.

In answer to your second question as to whether it would be permissible for the Board to receive registrations on Tuesday, September 7, 1954, it is found that the St. Louis Court of Appeals has in State ex rel. Hay et al. vs. Flynn, 235 Mo. App. 1003, 147 S.W. (2d) 210, l.c. 212, declared that no voter may be registered after the closing day mentioned in the statute, saying:

Board of Election Commissioners
for the City of St. Louis:

"It cannot be denied that the foregoing provisions furnish a very efficient check against fraudulent voting, and to allow names to be entered upon the registration lists subsequent to the close of registration would be to defeat the purpose which the General Assembly had in view in framing the law, and from a consideration of the entire statute, its nature, its object, and the consequences that would result if the provisions of Section 15 were construed as directory, and considering the provisions of Section 15 itself, which are mandatory in form, we are of the opinion that the General Assembly intended the provisions of said section, that no voter should be registered after the closing of registration, to be mandatory."

Since the twenty-fourth day preceding the thirtieth day of September, 1954, is September 6, 1954, we conclude that registrations for the subject election must end at 5 o'clock p.m. on September 6, 1954.

CONCLUSION

It is, therefore, the opinion of this office that the Board of Election Commissioners for the City of St. Louis, may be opened for registration of voters on September 6, 1954, even though that day is a legal holiday.

It is further the opinion of this office that registrations for an election to be held in the City of St. Louis on September 30, 1954, must be closed at 5 o'clock p.m. on September 6, 1954.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

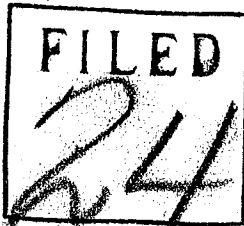
PMcG:irk

BY:

JOHN W. INGLISH
Acting Attorney General

STATE PARK BOARD:
EMINENT DOMAIN:

Missouri State Park Board authorized to
condemn land in Adair County, Missouri.



August 20, 1954

Honorable Phil M. Donnelly
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnelly:

This will acknowledge receipt of your request for an
official opinion which reads:

"I have received a request from the
Division of Procurement to approve a
Departmental Direct Order No. 895,
issued by the State Park Board of
Missouri, for the purchase of one
hundred fifty-nine (159) acres of
real estate in Adair County, Missouri,
surrounded by the Thousand Hills State
Park. This land is described as
follows:

"The South Half of the Northeast
Quarter except the following described
tract used for School purposes; Com-
mencing at the Northwest Corner of
said Tract and running thence South
17 rods and 88 links, thence East 17
rods and 88 links, thence North 17
rods and 88 links, thence West 17 rods
and 88 links to the place of beginning;
the Northeast Fourth of the Southeast
Quarter of Section 11 and the Northwest
Fourth of the Southwest Quarter of
Section 12, all in Township 62, Range 16."

Honorable Phil M. Donnelly

"I will appreciate an opinion from your office, advising whether the State Park Board has authority under the law to purchase the above-described real estate, or whether a special Act of the Legislature is required."

The 67th General Assembly enacted HCSHB 8 and 32 (page 317-321, Laws of Missouri, 1953) which repealed Chapter 253, Revised Statutes of Missouri, 1949, relating to the creation of a State Park Board, its powers and duties and enacted several new sections in lieu thereof relating to the same subject.

Section 3 thereof, known as Section 253.040, RSMo 1953 Cumulative Supplement reads:

"1. The board is hereby authorized to accept or acquire by purchase, lease, donation, agreement or eminent domain, any lands, or rights in lands, sites, objects or facilities which in its opinion should be held, preserved, improved and maintained for park or parkway purposes. The board is authorized to improve, maintain, operate and regulate any such lands, sites, object or facilities when such action would promote the park program and the general welfare. The board is further authorized to accept gifts, bequests or contributions of money or other real or personal property to be expended for any of the purposes of this chapter; except that any contributions of money to the state park board shall be deposited with the state treasurer to the credit of the state park fund and expended upon authorization of the state park board for the purposes of this chapter and for no other purposes.

"2. In the event the right of eminent domain be exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the state highway commission."

Honorable Phil M. Donnelly

The board referred to in the foregoing statute is the Missouri State Park Board created under and by virtue of Section 1 of the aforesaid bill, now known as Section 253.020, RSMo 1953 Cumulative Supplement.

Under the foregoing statute, namely Section 253.040, it clearly vests in said board authority to acquire by purchase and eminent domain any lands, which in the opinion of said board should be preserved, improved and maintained for park or parkway purposes. Said board has heretofore determined that it needs the above described land for park purposes, and requested this department to proceed by eminent domain to acquire said land. Proceedings were duly instituted in the Circuit Court of Adair County, Missouri. The trial court ordered said land condemned and appointed commissioners to appraise it. The commissioners returned an appraisal of \$65.00 per acre, and this is a request for money to be paid to the Circuit Clerk of Adair County, Missouri, for said land.

The General Assembly may, by a special act, authorize the purchase of certain land by departments, boards or commissions or agencies of the state, or it may by law vest general authority in any such department, board, commission or agency to acquire by purchase or eminent domain any land it deems necessary for certain specified purposes.

Section 104, page 1075-1076, 81 C.J.S., lays down the general rule and reads:

"A state has the same proprietary rights as a person and may acquire real or personal property by conveyance, will, or otherwise, and hold or apply it to any purpose as it sees fit. A state can hold land in another state with the consent of the latter; It holds such land as a subject and not as a sovereign.

"A state has the same proprietary rights as a person or has the same proprietary rights as a corporation, and a state acting in a proprietary capacity as an owner of property is bound by the same rules as those which it applies to its citizens. It may acquire property, real or personal, by conveyance, will, or otherwise, and hold or apply it to any purpose, public or private, as it sees fit. The power of the

Honorable Phil M. Donnelly

state in respect of its property rights is vested in the legislature and the legislature alone can exercise the power necessary to the enjoyment and protection of those rights, by the enactment of statutes for that purpose, and, where the state has not given its consent to the acquisition of property in a particular way, it is not entitled thus to acquire it. * * *

In *State v. Gordon*, 36 S.W. (2d) 105, 1.c. 106, the court held that the exercise of the power of eminent domain or to authorize its exercise is wholly legislative and that a state agency exercising such power must be able to point out the statute authorizing same. In so holding the court said:

"The power of eminent domain is inherent in sovereignty and exists in a sovereign state without any recognition of it in the constitution. Constitutional provisions relating to the taking of property are but limitations upon a power which would otherwise be without limit. 10 R. C. L. 11. The right to exercise the power, or to authorize its exercise, is wholly legislative. When an agency of the state asserts that the right to exercise the power has been delegated to it, it must be able to point out a statute which in express terms or by clear implication authorizes such exercise and to the extent claimed. There is no constitutional question involved in this case. * * *

Nichols on Eminent Domain, Second Edition, Volume 2, Section 355, page 981, reads in part, as follows:

"The power to institute the exercise of eminent domain resides under ordinary conditions exclusively in the legislature. In some cases the legislature itself by the mere enactment of a statute effects the taking of certain land or interests in land for the public use, but ordinarily the taking of private property involves so much detail work that it is delegated

Honorable Phil M. Donnelly

to administrative officers or to subordinate bodies, to be exercised by them either directly or by means of the inception of judicial proceedings, and there can be no doubt that, for proper purposes, the power of eminent domain may be delegated to duly accredited agencies."

See also Northeast State Teachers College v. Palmer, 204 S.W. (2d) 291, 356 Mo. 946.

Authority for the Missouri State Park Board to acquire land by purchase or eminent domain was vested in said board when the State Park Board was first created in 1937. (See Section 15329, Revised Statutes of Missouri, 1939.)

CONCLUSION

Therefore, it is the opinion of this department that the Missouri State Park Board is vested with authority to purchase or acquire land under Section 253.040, supra, and to acquire the above described land by eminent domain.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Aubrey R. Hammett, Jr.

Yours very truly,

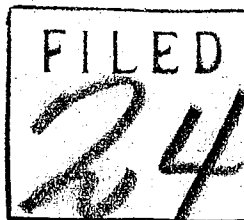
JOHN M. DALTON
Attorney General

ARH:vlw

DEPARTMENT OF CORRECTIONS: (1) The Department of Corrections,
PUBLIC BUILDINGS: with the approval of the Board of
Public Buildings, has the authority
to determine that a particular building used by such department
and which is no longer useful, shall be razed.. (2) Director of
Department of Corrections, with approval of the Governor, has
authority to determine type of buildings to be erected for the
use of the Department of Corrections. (3) Contracts for the
razing and construction of buildings for Department of Correc-
tions are subject to the approval of the Director of Public
Buildings.

August 30, 1954

Honorable Phil M. Donnelly
Governor of Missouri
Executive Offices
State Capitol Building
Jefferson City, Missouri



Dear Governor Donnelly:

Reference is made to your request for an official opinion
of this department reading as follows:

"The Fifty-fourth General Assembly of Mis-
souri, in 1927, enacted Senate Bill No.
138 (Laws of Missouri, 1927, page 363),
'Providing for a Separate Institution for
the Segregation, Detention and Punishment
of Incurable Offenders Within Walls of
State Penitentiary.' An appropriation of
\$250,000.00 was made for this 'Separate
Institution' and it was accordingly con-
structed in due course of time.

"It has now developed, however, that this
building is in a dilapidated and useless
condition, has long been abandoned, is of
no value to the State Penitentiary, and
should be dismantled and torn down in the
interest of safety and to improve the gen-
eral appearance of the State Penitentiary
grounds.

"Section 8.010, Revised Statutes of Mis-
souri, 1949, provides that The Board of
Public Buildings 'shall have general super-
vision and charge of the public property of
the state at the seat of government . . .'

Honorable Phil M. Donnelly

"Section 8.120, Revised Statutes of Missouri, 1949, provides that the Director of Public Buildings 'shall contract for and superintend the repairs and construction of any public buildings or improvements that may be required, by law, at the seat of government, when no other person or officer is directed to do the same.'

"Section 217.130, Revised Statutes of Missouri, 1949, provides that the Director of the Department of Corrections and the Governor 'shall decide what improvements (at the State Penitentiary) are necessary, not otherwise provided by law, which improvements shall be made under the direction and supervision of the division.'

"Also, would said Section 217.130 be construed as broad enough to authorize the Director and the Governor to determine the kind of buildings that should be erected on or near the premises where said present building is razed?

"There may be other sections applicable to this situation.

"In view of these somewhat conflicting sections of the statutes, I will appreciate an opinion from your office advising as to what officials have the authority to order the razing of the above described dilapidated structure and what officials shall supervise said dismantling or tearing down of this building."

We first direct your attention to a portion of Section 216.020 RSMo 1949, reading, in part, as follows:

"The department of corrections shall have the following powers:

* * * * *

"(5) To have control and jurisdiction of all real estate, buildings, equipment, machinery, facilities and products properly

Honorable Phil M. Donnelly

belonging to or used by or in connection with any of said institutions and branches thereof;

* * * * *

"(7) To have and exercise such further powers and duties as may be necessary to enable it to carry out its functions under the law."

We believe that this statutory authorization confers upon the Department of Corrections the power to make an original determination that a particular building used in connection with the discharge of the duties of such department is no longer suitable for the purposes of such department and should be razed.

However, as further bearing upon this question, we direct your attention to Section 8.010 RSMo 1949, which reads as follows:

"The head of the division of public buildings shall be 'The Board of Public Buildings.' The governor, attorney general, lieutenant governor and their successors in office shall constitute the board of public buildings. The governor shall be chairman and the lieutenant governor, secretary. The board shall have general supervision and charge of the public property of the state at the seat of government and such other duties as may be imposed on it by law."

These statutes relate to the same general subject matter, and therefore should be construed in such a manner as to harmonize their provisions, if possible. We believe that such a construction necessarily leads to the conclusion that a legislative intent has been expressed authorizing the Department of Corrections to make the original determination of nonusability as discussed supra. However, it further appears that such determination is thereafter subject to the approval of the Board of Public Buildings.

As bearing upon the problem arising from the need for replacement of such a facility no longer used, we direct your attention to Section 217.130 RSMo 1949, reading, in part, as follows:

Honorable Phil M. Donnelly

"The director and governor shall decide what improvements are necessary, not otherwise provided by law, which improvements shall be made under the direction and supervision of the division. * * *"

Here again, it seems to us, the General Assembly has granted specific authority to the Governor and the Director of the Department of Corrections to provide for the erection of any buildings which may be deemed necessary for the welfare of the prisoners committed to the state penitentiary, provided that an appropriation for the payment of the cost thereof is available. Having the authority to determine the necessity of such construction, it seems that impliedly there is also conferred upon such officials the right to determine the particular type of building which would best fulfill the purpose for which constructed.

However, what has been said heretofore with respect to the apparently unqualified rights of the Director of the Dept. of Corrections, considered in the light of certain antecedent statutory enactments, appear to be circumscribed thereby. We refer to general provisions relating to the maintenance and construction of public buildings, some of which have formed a part of our statutory law since the adoption of an act found Laws of Missouri 1835, page 115. Such acts, with subsequent amendments, now form Chapter 8, RSMo 1949. Included therein are other statutory enactments creating a Board of Public Buildings of the State of Missouri located at the seat of government. This board operates through the agency of an officer known as the Director of Public Buildings.

Several statutes bear upon the functions of the Board of Public Buildings and the Director of Public Buildings. Among them we find Section 8.070 RSMo 1949, reading as follows:

"The director shall serve as an advisor and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. No contracts shall be let for repair, rehabilitation, or construction of buildings, without approval of the director, and no claim for repair, construction or rehabilitation projects under contract shall be accepted for payment by the state without approval by the director; provided, that there is excepted

Honorable Phil M. Donnelly

herefrom the design, architectural services, construction, repair, alteration or rehabilitation of all laboratories, libraries, classrooms, technical buildings used for teaching purposes, and those buildings or utilities serving such educational units, and any building or teaching unit built wholly or in part from funds other than state appropriations."

Also Section 8.120 RSMo 1949, reading as follows:

"He shall contract for and superintend the repairs and construction of any public buildings or improvements that may be required, by law, at the seat of government, when no other person or officer is directed to do the same."

From the foregoing statutes, we reach the conclusion that the authority conferred upon the Governor and Director of the Department of Corrections with respect to the erection of buildings for the use of such department, is to be exercised pursuant to the provisions relating to the Board of Public Buildings and to the Director of Public Buildings. In other words, it is our thought that contracts to be negotiated for the carrying out of the powers of such officials are to be approved by the Director of Public Buildings.

CONCLUSION:

In the premises, we are of the opinion:

(1) That the Department of Corrections, with the approval of the Board of Public Buildings, has the authority to determine that a particular building used by such department and which is no longer useful, shall be razed.

(2) That the Governor and Director of the Department of Corrections has the authority to determine the type of building to be erected for the use of the Department of Corrections, either as a completely new structure or as a replacement for one previously used, provided that money for the payment of the cost thereof has been appropriated; and,

Honorable Phil M. Donnelly

(3) That all contracts for the construction of a new building or buildings by the Governor and the Director of the Department of Corrections for the use of such department are subject to the approval of the Director of Public Buildings.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

ELECTIONS:
CHALLENGERS:
WATCHERS:
POLITICAL PARTIES:

Mr. Paul W. Preisler, candidate for Representative in Congress from the Second Congressional District on the Nonpartisan ticket is not entitled to have challengers and watchers present at the polling places within said Congressional District; St. Louis City Nonpartisan Committee is not entitled to have challengers and watchers present at said polling places in the absence of a showing that said group is a political party within the meaning of Secs. 120.140 and 120.160, RSMo Cum. Supp. 1953.
.....

October 22, 1954

Honorable Michael J. Doherty
Chairman
Board of Election Commissioners
for the City of St. Louis
208 South 12th Boulevard
St. Louis 2, Missouri

Dear Mr. Doherty:

By letter of October 4, 1954, you requested an official opinion as follows:

"Under date of October 1, 1954, the Board of Election Commissioners received a letter from Oscar J. Albrecht, Chairman of the Saint Louis City-Non-Partisan Committee, 4455 Wallace 16, St. Louis, Missouri, wherein he states in substance that the St. Louis City Non-Partisan Committee elected him as Chairman of said Committee, and further, he states in substance, that challenger and watcher certificates for persons to act as such for the Non-Partisan Ticket will be assigned by him and that such persons shall be admitted to the precinct polling places to which they are assigned by him. A copy of his letter is enclosed which is self-explanatory.

"For your information, one Paul W. Preisler, who is a nominee for Congress from the Second Congressional District, is supported by said Committee, according to said letter.

"Should Oscar J. Albrecht, Chairman of said Committee issue challenger and watcher certificates, then, in that event, will you please advise as to whether or not this Board is obliged to recognize and accept such challengers and watchers."

FILED

24

Honorable Michael J. Doherty:

The letter to which you refer reads:

"St. Louis, Mo.
October 1, 1954.

"The Honorable Board of Election Commissioners
of the City of St. Louis, Mo.
208 So. 12th St.
St. Louis, Mo.

"Gentlemen:

"The members of the St. Louis City Non-Partisan Committee which is supporting the election of Paul W. Preisler to Congress from the Second Congressional District have elected me, Oscar Albrecht, the undersigned, Chairman of the St. Louis City Non-Partisan Committee. There are no other candidates on the Non-Partisan ticket in the general election of November 2, and Mr. Paul W. Preisler recognizes me as the duly elected chairman of the St. Louis City Non-Partisan Committee.

"Since some confusion might result at polling places on November 2, unless precinct election officials are properly informed, I request that the Board suitably notify such precinct election officials in all precincts of the Second Congressional District, that challenger and watcher certificates for the persons who will act as challengers and watchers for the Non-Partisan ticket will be signed by me, Oscar Albrecht, and that such persons shall be admitted to the precinct polling places to which they are assigned by me to perform the usual duties of challengers and watchers.

"If any legal questions or matters arise in connection with this request, or other matters relating to the Non-Partisan ticket in the election of Nov. 2, please communicate with Mr. Paul W. Preisler, 3709 Juniata St., (16) who is authorized to act as my attorney.

"A reply as to the action taken by the Board will be appreciated.

Honorable Michael J. Doherty:

"(Signed) Respectfully yours,

OSCAR J. ALBRECHT.

COPY

Chairman, St. Louis City Non-Partisan Com
4455 Wallace (16), St. Louis, Mo."

Section 118.510, RSMo 1949, which provides for challengers and watchers at the polling places in the City of St. Louis was declared by the Supreme Court in the case of Preisler vs. Calcaterra, 243 S.W. (2d) 62, to be unconstitutional. The Court further stated that Section 10613, R.S. Mo. 1929, supposedly repealed upon enactment of Section 118.510, is still in force and effect. Section 10613, R.S. Mo. 1929, which is applicable to the City of St. Louis, reads:

"At every registration and election, each one of the political parties shall have the right to designate and keep a challenger at each place of registration, revision of registration and voting who shall be assigned such position immediately adjoining the judges of election inside the polling or registration booth, as will enable him to see each person as he offers to register or vote, and who shall be protected in the discharge of his duty by the judges of election and the police. And authority signed by the recognized chairman or presiding officer of the chief managing committee of a party in any such city, shall be sufficient evidence of the right of the challenger for such party to be present inside the registration or polling place. But in case any challenger does not or cannot produce the authority of such chairman, it shall be the duty of such judges of election to recognize a challenger that shall be vouched for and presented to them by the persons present belonging to such political party, or who shall be vouched for by the judge representing such party.

Honorable Michael J. Doherty:

The chairman of the managing committee of each political party for such city may remove any challenger appointed by him, and substitute another in his place. The challenger so appointed and admitted to the room where such ballot box is kept shall have the right and privilege of remaining during the canvass of the votes, and until the returns are duly signed and made. Each political party shall also have the right to a challenger placed conveniently outside of the polling booth, but not in the way of the voters. In addition to such challengers, each of the political parties casting votes at such polls, at the close of the polls shall have the right to the admission of two persons of their political faith into the room where such ballots are to be canvassed, to watch such canvass, which watchers may be selected as above prescribed in case of challengers; and in the absence of such selection, it shall be the duty of the judges of such election to admit into such room two persons of each political party so voting at such election, and who shall be vouched for by the judge or judges representing such political party, to be present during the canvass of such votes and the making of such returns; that such persons shall be of good character and sober, and shall in no wise interfere with such canvass. The police shall in no manner interfere with the entrance of such watchers into such room, but they shall keep order; and in case of any disorderly conduct on the part of any bystanders or watchers, it shall be the duty of the police, upon request of the judges, to exclude such persons from such room, and upon such watcher or watchers being excluded from such room, the judge or judges representing the same political party as the rejected watcher may select other watchers in their stead."

Therefore, if the members of the St. Louis City Nonpartisan Committee constitute a political party the group is entitled to have challengers and watchers at the polls in the forthcoming General Election. If they

Honorable Michael J. Doherty:

do not constitute a political party the group is not entitled to challengers and watchers.

We know from the case of State ex rel. Preisler vs. Toberman, 269 S.W. (2d) 753, that Mr. Preisler filed his declaration of candidacy for Representative in Congress from the Second Congressional District on the Nonpartisan ticket. His declaration was pursuant to Sections 120.360 and 120.450, RSMo 1949. Those sections read:

"120.360. Deposit to general revenue fund, when.--Any person desiring to file declaration papers or propose as a candidate on any independent or nonpartisan ticket, who does not announce by declaration papers as a candidate for any political party as defined by sections 120.300 to 120.650 and is not a member of a political party having a state and county committee, or treasurer thereof, shall pay the sum of money required by sections 120.300 to 120.650 to be paid by the candidate for the office for which he proposes to the state or county treasurer, as the case may be, take a receipt therefor and file said receipt with his declaration papers, said sum of money so paid shall go into the general revenue fund of the state or county."

"120.450. Method of preparing tickets--method of voting.--At all primaries there shall be as many separate tickets as there are parties entitled to participate in the primary election. There shall also be a nonpartisan ticket upon which, under appropriate title of each office, shall be printed the names of all persons by whom declaration papers have been filed, as required by sections 120.300 to 120.650, who do not announce by such declaration papers as candidates for any political party as defined by sections 120.300 to 120.650. The names of all candidates shall be arranged under the appropriate title of the respective offices and under the proper party designation upon the party ticket or upon the nonpartisan ticket, as the case may be. The names of the candidates for each office shall be altered

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on the ballots used in the several election districts or precincts so that each name shall appear thereon substantially an equal number of times at the top, at the bottom and in each intermediate place, if any, or the lists or group of names in which such candidate's name belongs. The names of the candidates shall be printed, and at the left of the name of each candidate, at the beginning of each line upon which the candidate's name is printed, a small square shall be printed, the sides of which shall be not less than one-fourth of an inch in length. The title of the office and the name of all candidates for that office shall be separated from the title of the following office and group of candidates by a line not to exceed four points in width. At primary elections at which committeemen or committeewomen of any party are to be elected, in addition to the names of candidates for offices printed on the ballot, there shall be printed thereon at least one blank line with a square to the left of the same, as herein specified, for the purpose of allowing the voter to write in the name of his choice for office. As nearly as practicable, the ballot shall be in the form described in sections 111.420 and 111.430. At the head of each such ticket, immediately following the date of such election, shall be printed the following: 'Instruction to voters; Place an X in the square opposite the name of the person for whom you wish to vote.' The voter shall cast his vote in accordance with this instruction and shall vote in no other manner. All officers charged with the preparation and distribution of such ballots shall cause the printer's forms to be so transposed and the ballots so made up as to carry out the intent of this provision. If any elector write upon his ticket the name of any person who is a candidate for the same office upon some other ticket than that upon which his name is so written, this ballot shall not be counted for such person. On any day of

Honorable Michael J. Doherty:

nomination of public officers in any primary election precinct, each qualified elector shall be entitled to receive from the judge of the election one ballot of the political party participating in such election for which he desires to vote. It shall be the duty of such judges of election to deliver such ballot to the electors. Before delivering any ballot to the elector, the two judges of election having charge of the ballot shall write their names or initials upon the back of the ballot except as provided by law."

Therefore, we must conclude that Mr. Preisler is not the nominee of any political party. His declaration on the Nonpartisan or Independent ticket is antithetic to the idea that he constitutes or represents a political party. Therefore, he is not entitled to have challengers and watchers at the polls in the forthcoming General Election.

The St. Louis City Nonpartisan Committee does not appear to be an established political party within the meaning of Section 120.140, RSMo Cum. Supp. 1953, which provides:

"1. The term 'political party' as used in sections 120.140 to 120.230 shall mean any 'established political party' as hereinafter defined and shall also mean any political group which shall hereafter undertake to form an established political party provided for in sections 120.140 to 120.230; provided, that no political organization or group shall be qualified as a political party, or given a place on a ballot, which organization or group advocates the overthrow by violence of the established constitutional form of government of the United States or the state of Missouri.

"2. An 'established political party' is hereby declared to be a political party which, as to the state, at the last general election for state and county officers, polled for its candidate for governor more than two per cent

Honorable Michael J. Doherty:

of the entire vote cast for governor in the state; and, as to any district or political subdivision of the state, a political party which polled more than two per cent of the entire vote cast in such district or political subdivision at such election.

"3. A political party, which in any congressional district, senatorial district, county, township, school district, municipality or other district or political subdivision of the state, polled more than two per cent of the entire vote cast within such congressional district, senatorial district, county, township, school district, municipality or other district or political subdivision of the state, where such district or political subdivision, as the case may be, has voted as a unit for the election of officers to serve the respective territorial area of such district or political subdivision, is hereby declared to be an 'established political party' within the meaning of sections 120.140 to 120.230 as to such district or political subdivision."

Nor does it appear that such group has become a new political party within the meaning of Section 120.160, RSMo Cum. Supp. 1953, which provides:

"1. Any group of persons hereafter desiring to form a new political party throughout the state, or in any political subdivision greater than a county and less than the state, shall file with the secretary of state a petition, as hereinafter provided, and any group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any group of persons hereafter desiring to form a new political party in any political subdivision less than a county shall file such petition with the clerk or board of election commissioners of such political subdivision, as the case may be. Any such petition for the formation of a new political party throughout the state, or in any district or political subdivision as the case may be, shall declare as concisely as may be the intention of the signers thereof to form a new political party

Honorable Michael J. Doherty:

in the state, district or political subdivision; shall state in not more than five words the name of the proposed political party; shall contain a complete list of candidates of all offices to be filled in the state or district or political subdivision, as the case may be, at the next ensuing election then to be held; and, if the new political party shall be formed for the entire state, shall be signed by a number of qualified voters in each of the several congressional districts which shall equal one percent of the total number of votes cast in such district for governor at the next preceding gubernatorial election, or by a number of qualified voters in each of one half of the several congressional districts which shall equal two per cent of the total number of votes cast in such district for governor at the next preceding gubernatorial election. If the new political party shall be formed for any district or political subdivision less than the entire state, the petition shall be signed by qualified voters equaling in number not less than two per cent of the number of voters who voted at the next preceding general election in the district or political subdivision in which such district or political subdivision, voted as a unit for the election of officers to serve its respective territorial area.

"2. The filing of such petition shall constitute the political group a new political party, for the purpose only of placing upon the ballot at the next ensuing election the list of party candidates for offices to be voted for throughout the state, or for offices to be voted for in the district or political subdivision less than the state, as the case may be, under the name of, and as candidates of such new political party. If, at the ensuing election, any candidate or candidates of the new political party shall receive more than two per cent of all votes cast at such election in the state, or two per cent of the total vote cast in any district or political subdivision of the state,

Honorable Michael J. Doherty:

as the case may be, then such new political party shall become an established political party within the state or within the district or political subdivision, as the case may be, under the provisions of the laws regulating the nominations of established political parties at state primary elections as now, or hereafter may be in force.

"3. Any such petition shall be filed at the same time and shall be subject to the same requirements and provisions that are hereafter contained in regard to the nomination of any other candidate or candidates by petition."

Therefore, we conclude that said group is not a political party and thus is not entitled to have challengers and watchers at the polls in the forthcoming General Election.

CONCLUSION

In the premises, it is the opinion of this office that Mr. Paul W. Preisler, candidate for Representative in Congress from the Second Congressional District on the Non-partisan ticket, is not entitled to have challengers and watchers present at the polling places within the Second Congressional District; nor is the St. Louis City Non-partisan Committee entitled to have challengers and watchers present at said polling places in the absence of a showing that said group is a political party within the meaning of Sections 120.140 and 120.160, RSMo Cum. Supp. 1953.

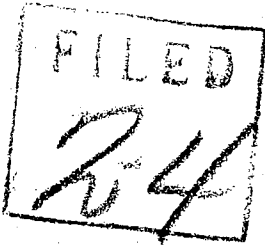
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk

ELECTIONS: Prohibition against "political activity" by members of and employees of St. Louis City Board of Election Commissioners is not violated by attendance at political meetings nor by voluntary contributions to political parties, provided that participation in such activity is limited to that extent.



October 29, 1954

Honorable Michael J. Doherty, Chairman
St. Louis City Board of Election Commissioners
208 South Twelfth Boulevard
St. Louis 2, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"The Board of Election Commissioners are desirous of securing from your office an opinion concerning certain portions of Section 118.040 R.S. Mo. 1949.

"The said Section provides as follows:

"No Commissioner shall hold any office in any political party, nor engage in any political activity of any kind while serving as such Commissioner."

"Another part of said Section prescribes the right to employ assistants and recites the following:

"and shall be subject to the same restrictions and subscribe to the same oath as members of the Board."

"Inquiry One: 'May an assistant or assistants of this office attend a political dinner of his or her political belief, and may they make contributions to said dinner?'

"Two: 'May they attend a political meeting, even though they take no part other than attending?'

Hon. Michael J. Doherty, Chairman

"Three: 'May they make voluntary contributions to their respective political parties, even though they take no part other than above stated?'

"Four: 'May they attend any kind of a political gathering whatsoever of the political party they are serving under as a member of this office, even though they take no part other than being present at such?'

"The above stated matters have come to the attention of certain members of the Board regarding inquiries on same, and the Board is anxious to know if the words in said Section wherein it refers to assistants, their appointments, etc., and particularly the words 'and shall be subject to the same restrictions' apply to and mean or be construed to read the same as that which relates to the Commissioners, to-wit: 'nor engage in any political activity of any kind while serving as such Commissioner.'

"The Board will appreciate your opinion on the above stated matters."

Your quoted excerpts from the statute under consideration, namely, Section 118.040, RSMo 1949, are verbatim, and therefore we will not requote such statute.

In the construction of statutes, the most important rule is that such construction is to be for the purpose of ascertaining the intent of the General Assembly in enacting the statute under consideration. In arriving at such intent, other statutes dealing with the same subject matter may be considered, as well as the history surrounding the enactment of such statute and the apparent purpose for which enacted.

With these rules in mind, we have examined all of Chapter 118, RSMo 1949, relating to the registration of voters and the conduct of elections in cities containing over 600,000 inhabitants. Our examination of this chapter indicates that the legislative scheme is to provide a bipartisan supervisory board to oversee the registration of voters and the conduct of elections in such cities, the mechanics of which are to be carried out through bipartisan employees. We note that the supervising

Hon. Michael J. Doherty, Chairman

commission is constituted of two representatives each of the two major political parties. We note, too, that all of the employees of such commission are to be selected equally from each of the two major parties. We note, too, that the judges and clerks of election to be selected by such commission are to be divided equally between the two major political parties. In other words, at no place in the entire chapter is there any expression of intent to disassociate the commission nor its employees nor the judges and clerks of election from political parties as such. As a matter of fact, a person without known political affiliations would be ineligible for appointment as a member of the commission and from employment as an administrative employee or judge or clerk of election.

Having seen fit to establish such a bipartisan agency, the General Assembly has gone one step further and included a prohibition against such persons engaging in "political activities." This surely could not be construed to mean that immediately upon appointment to any place in the over-all administrative scheme that the appointee should no longer maintain any political affiliations. To so construe the statute would lead to an absurd result and would have the effect of thwarting the legislative intent that through the bipartisan selection of the commission, employees, judges and clerks of election, a system of checks and balances is to be established and maintained. It thereupon becomes necessary to determine the sense in which the General Assembly used the term "political activity" in the statute under consideration.

It seems to us that this term, as used in such statute, means more than mere passive affiliation with a political party. It seems that a more reasonable construction of the term is one embracing active participation through the holding of official positions, serving as the agent of a party in the solicitation of funds, speaking at public meetings in favor of the principles of a particular political party, and other similar activities. In other words, it seems to us that the term implies affirmative, active participation in the affairs of a political party rather than mere membership therein.

Adverting to your letter of inquiry, we note that each question relates to more or less passive association with the affairs of a political party. Applying to the facts outlined the definition of "political activity" which we feel to be the proper one, we are led to the belief that a commissioner or an employee may properly attend political meetings, provided that at such meetings such commissioner or employee is not a speaker, urging others to

Hon. Michael J. Doherty, Chairman

adopt his political beliefs. We further believe that a voluntary contribution to be used by a political party is not such a "political activity" as is proscribed by the statute.

CONCLUSION

In the premises, we are of the opinion that the prohibition against "political activity" by the members of the St. Louis City Board of Election Commissioners, its employees, and the judges and clerks of election appointed by such commission, does not preclude attendance by such persons at political meetings nor the making of voluntary contributions to a political party, provided that such person does not participate as a speaker or officer arranging or conducting such meeting, and, provided further, that such person does not solicit funds from other persons for the benefit of such political party.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

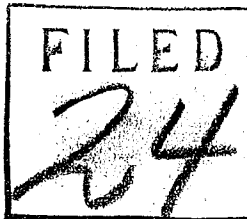
Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

SHERIFFS:
CONSTITUTIONAL LAW:

County sheriffs receiving a certificate of election under Section 57.010, RSMo 1949, must be commissioned by the Governor under Article IV, Section 5, Missouri Constitution of 1945.



December 7, 1954

Honorable Phil M. Donnelly
Governor of Missouri
Executive Office
Jefferson City, Missouri

Dear Governor Donnelly:

This formal opinion is rendered in answer to your recent oral inquiry which this office restates in the following language.

Is it the duty of the Governor of Missouri to issue a commission to county sheriffs who have been issued a certificate of election under the terms of Section 57.010, RSMo 1949.

Section 57.010 RSMo 1949 provides as follows:

"At the general election to be held in 1948, and at each general election held every four years thereafter, the qualified voters in every county in this state shall elect some suitable person sheriff. No person shall be eligible for the office of sheriff who has been convicted of a felony. Such person shall be a resident taxpayer and elector of said county, shall have resided in said county for more than one whole year next before filing for said office and shall be a person capable of efficient law enforcement. When any person shall be elected sheriff, the clerk of the county court shall deliver

Honorable Phil M. Donnelly

to him a certificate of his election, under the seal of the court, and shall also certify that fact to the clerk of the circuit court, who shall file the certificate in his office; and he shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election."

Article IV, Section 5, Missouri's Constitution of 1945, contains the following language relative to the Governor's duty in commissioning officers.

"The Governor shall commission all officers unless otherwise provided by law. All commissions shall be issued in the name of the state, signed by the governor, sealed with the Great Seal of the state and attested by the secretary of state."

In the early case of State ex rel. Attorney General v. Pool, 41 Mo. 32, the Supreme Court of Missouri was ruling the question of whether a person duly elected sheriff could discharge the duties of such office before receiving a commission from the Governor. The constitutional provision then before the Court was not unlike the constitutional provision quoted in the preceding paragraph. In ruling the point the Court spoke as follows at 41 Mo. 32, 1.c. 38:

"It is within the competency of the Legislature to declare what requisites shall be sufficient to clothe the officer with authority, and induct him into office, without the necessity of a commission; but until an act is passed for that purpose the constitutional injunction seems to be imperative."

The foregoing case of State ex rel. Attorney General v. Pool was decided in 1867. In 1886 the St. Louis Court of Appeals ruled the case of Adams v. Harper, 20 Mo. App. 684, and construed Article V, Section 23 of Missouri's Constitution of 1875, which Section 23 conforms to Article IV, Section 5, of Missouri's Constitution of 1945, with only a slight change in language. The 1875 constitutional provision provided that:

Honorable Phil M. Donnelly

"The Governor shall commission all officers not otherwise provided for by law."

whereas the present constitutional provision reads:

"The Governor shall commission all officers unless otherwise provided by law." (Emphasis supplied.)

We do not consider the slight difference in wording found in the constitutional provision above quoted, to affect the ruling in Adams v. Harper, supra, wherein the Court throws light on the phrase "not otherwise provided for by law." The Court spoke as follows at 20 Mo. App. 684, l.c. 686, when holding that the county court had authority to commission a county treasurer:

"The point that the court erred in admitting in evidence the commission of the plaintiff, granted by the county court is based on the assumption that, by the terms of section twenty-three of article five, of the constitution, the governor, and not the county court, is required to issue the commission of the county treasurer. The constitutional provision is that, 'the governor shall commission all officers, not otherwise provided for by law.' Section 5362, Revised Statutes, provides that the county treasurer shall be commissioned by the county court. It is, therefore, a case 'otherwise provided for by law,' and the county court was the proper body to issue the commission."

A review of all statutes found in Chapter 57 RSMo 1949, the law particularly applicable to sheriffs, discloses no provision directing that the sheriff be commissioned. Therefore, under the ruling in Adams v. Harper, supra, it must be concluded that the sheriff must be commissioned by the Governor under the mandate found in Article IV, Section 5, Missouri Constitution of 1945.

CONCLUSION

It is the opinion of this office that county sheriffs who have been issued a certificate of election as provided

Honorable Phil M. Donnelly

in Section 57.010 RSMo 1949, must be commissioned by the Governor under the directive contained in Article IV, Section 5, Missouri's Constitution of 1945.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO'M:vlw

CRIMINAL LAW:

- (1) "Intent" not essential element in prosecution for violation of statutory crime mentioned
- (2) Magistrate in county having less than 70,000 inhabitants may assess penalty in excess of \$500.00 under Section 304.240, RSMo 1953, Cumulative Supplement.



March 27, 1954

Honorable J. R. Eiser
Prosecuting Attorney
Holt County
Oregon, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"We are finding some difficulty in trial of cases brought under the provisions of MoRS 1949, 304.180 to 304.240. Your opinion is requested in regard to the following matters, for future guidance:

"1. Is the question of intent material to such cases? Following are principal defenses offered and often proved by substantial evidence:

"a. Vehicle loaded by U.S. Government Ordinance Depot, and sealed. Load generally secret and driver ordered to proceed. Often there is a scale ticket showing vehicle was within limits when dispatched, but not always, and driver has no option about accepting load. Picked up as overloaded when he crosses Missouri scales.

"b. Load dispatched and proven to be properly loaded and within weight

Honorable J. R. Eiser

limits when dispatched. Due to adverse weather conditions, tractor and trailer pick up considerable in ice, snow or mud over the route, and arrested as being overloaded. In this case, every effort has been made to properly load the vehicle within legal limits. It is impossible to tell, often, upon dispatch how much or even if mud or ice the vehicle will pick up in transit, but in many cases this has been shown to run as high as a ton.

"c. Load dispatched and proven to be properly loaded and within weight limits when dispatched. Every precaution against load shifting shown to have been taken, but due to nature of cargo, load nonetheless shifts and results in scale showing axle overloaded.

"In each of the foregoing cases, it is clear that there was no intent to overload, but on the contrary, every precaution against overloading available has been taken. What is your opinion of the correct result in each instance and upon the general question?

"2. The jurisdictional limit of this magistrate court is \$500.00. Has a magistrate, in assessing fines under 304.240, jurisdiction to assess a fine in excess of that limit, from the information, certify the case to the Circuit Court for trial?

"An early opinion would be appreciated."

Your first question as broken up into its three subdivisions relates to the necessity of charging and proving criminal "intent" in prosecutions for the crimes denounced by Sections 304.180 and 304.240, RSMo 1953, Cumulative Supplement. We will not set out at length these statutes verbatim but it will suffice to say that they are traffic regulation statutes designed to prevent overloading motor vehicle

Honorable J. R. Eiser

carriers on the public highways. We do note in passing however, that neither statute incorporates the provisions that the act decried therein must be "knowingly" done to constitute an offense. We feel this to be pertinent for reasons which will appear infra.

The general rule with respect to crimes of the nature such as those denounced by the statutes mentioned is stated thus in 22 C.J.S., "Criminal Law", Paragraph 30, which reads in part, as follows:

"The legislature may make an act criminal without regard to the intent or knowledge of the doer. Whether it has done so is to be determined from the language and purpose of the statute. Where the statute is silent, knowledge and criminal intent are generally essential if the crime involves moral turpitude, but not if it is *malum prohibitum*.

"By the express terms of a statute guilty knowledge is sometimes made an essential ingredient of the offense, as where it requires the act to be done 'knowingly,' etc. On the other hand, the legislature may forbid the doing of or the failure to do an act and make its commission or omission criminal without regard to the intent or knowledge of the doer, and if such legislative intention appears the courts must give it effect, and in such cases, the doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt; such legislation is enacted and is sustained, for the most part, on grounds of necessity, and is not violative of the federal constitution. * * *"

Our examination of the statutes involved in this opinion led us to the belief that prosecutions thereof fall within the general rule quoted as mentioned providing the elements of "knowledge" and "willfulness" are not embodied in the statutes. Neither are the acts described therein of the class of offenses described as being *malum in se*. Therefore we feel that the element of "intent" is neither necessarily to be charged nor proven in prosecutions brought under these statutes.

Honorable J. R. Eiser

As supporting this view we direct your attention to State v. Granger, 199 S.W. (2d) 896, wherein it was said, 1.c. 898:

"The entire gist of appellant's complaint now is that the information did not allege that the act of exposure was intentionally and unlawfully committed. And true the information does not contain the word 'intentionally.' Neither is it required to. An intention to commit an act forbidden by law is to be inferred, except under a statute which makes the intent an essential part of the statutory charge, which is not the case here. 42 C.J.S. Indictments and Informations, Sec. 134, p. 1025."

We observe that the population of Holt County according to the last federal decennial census is less than 70,000 inhabitants, therefore we take it that the statute which creates some doubt in your mind as to the jurisdictional limit of your magistrate court in assessing fines exceeding \$500.00 arises from the provisions of Section 482.090, RSMo 1949, of which Subsection 2 reads as follows:

"2. Except as otherwise provided by law, magistrates shall have original jurisdiction of all civil actions and proceedings for the recovery of money, whether such action be founded upon contract or tort, or upon a bond or undertaking given in pursuance of law in any civil action or proceeding, or for a penalty or forfeiture given by any statute of this state, when the sum demanded, exclusive of interest and costs, does not exceed five hundred dollars in counties which now have or may hereafter have not more than seventy thousand inhabitants, seven hundred and fifty dollars in counties which now have or may hereafter have more than seventy thousand and less than one hundred thousand inhabitants, one thousand dollars in counties which now have or may hereafter have one hundred thousand or more inhabitants."

(Emphasis ours.)

However, it is apparent that this statute relates to the recovery of judgments for money in civil proceedings and

Honorable J. R. Eiser

is to be contradistinguished from criminal proceedings in which a penalty exceeding \$500.00 may be imposed. To construe this statute otherwise would result in convicting the General Assembly of doing an absurd act, particularly when Section 543.010 is examined. This statute reads as follows:

"Magistrates shall have concurrent original jurisdiction with the circuit court, co-extensive with their respective counties in all cases of misdemeanor, except in cities having courts exercising exclusive jurisdiction in criminal cases, or as otherwise provided by law."

Having conferred jurisdiction in misdemeanor cases upon magistrate courts the General Assembly has also passed Section 556.270, RSMo 1949, reading as follows:

"Whenever any offense is declared by statute to be a misdemeanor, and no punishment is prescribed by that or any other statute, the offender shall be punished by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment."
(Emphasis ours.)

It is apparent that it was within the contemplation of the General Assembly that in some criminal cases magistrates should have jurisdiction to assess monetary penalties in criminal proceedings in excess of \$500.00.

For your further information we are enclosing a copy of an official opinion delivered by this office under date of April 29, 1953, to the Honorable A. R. Alexander, Judge of Probate, Clinton County, Missouri. This opinion is pertinent we feel to the first question you have proposed in your letter of inquiry.

CONCLUSION

In the premises we are of the opinion:

(1) That "criminal intent" need neither be charged nor proven in misdemeanor prosecutions brought under the pro-

Honorable J. R. Eiser

visions of Sections 304.180 and 304.240, RSMo 1953, Cumulative Supplement, and (2) That magistrates in counties having less than 700,000 inhabitants have jurisdiction to impose misdemeanor penalties in criminal proceedings in excess of the sum of \$500.00 when authorized by law, particularly with respect to penalties assessed under Section 304.240, RSMo 1953, Cumulative Supplement.

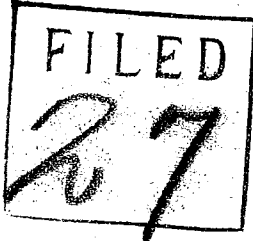
The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

WFB:vlw

ADJUTANT GENERAL'S
OFFICE:



Title to the above-described tract, located in the City of Marshall, Saline County, Missouri, as described in a corporation warranty deed dated December 4, 1953, is adequate, subject to no encumbrances, and vests in the State of Missouri, under local laws and ordinances, to the use for which the facility is intended, as of 1:00 p.m., December 10, 1953, subject to obtaining a certificate from the Clerk of the U. S. District Court wherein the said land is located, showing no pending suits, judgments, or other liens affecting the above described land.

January 15, 1954

Colonel C. E. Engelbrecht
Director of Facilities
Adjutant General's Office
Jefferson City, Missouri

Dear Colonel Engelbrecht:

On December 14, 1953, you requested this department to examine an abstract of title compiled and certified to by the Van Dyke Abstract Company of Marshall, Missouri, under date of December 10, 1953, to the following described land located in Saline County, Missouri:

"All the west 138.8 feet of Lot 5, Block 3 of Davis Addition to the City of Marshall, Missouri, being all the balance of Lot 5, Block 3, not heretofore deeded by the City of Marshall to the State of Missouri."

We have examined the abstract aforesaid to the above-described tract.

CONCLUSION

We certify that merchantable title to the above-described tract, located in the city of Marshall, Saline County, Missouri, as described in a corporation warranty deed dated December 4, 1953, is adequate, subject to no encumbrances, and vests in the State of Missouri, under local laws and ordinances, to the use for which the facility is intended, as of 1:00 p.m., December 10, 1953, subject to obtaining a certificate from the Clerk of the

Colonel C. H. Engelbrecht

United States District Court wherein the said land is located, showing no pending suits, judgments, or other liens affecting the above-described land.

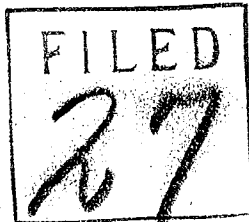
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

ADJUTANT GENERAL'S
OFFICE:



The title to the real estate located in the city of Cape Girardeau, Missouri, as described in a warranty deed from the city of Cape Girardeau to the State of Missouri, dated November 24, 1952, is adequate, subject to no encumbrances, and vests in the State of Missouri, under local laws and ordinances, to the use for which the facility is intended, as of 8:00 a.m. November 25, 1953, subject to a certificate from the Clerk of the United States District Court wherein said land is located, showing no pending suits, proceedings, judgments or other liens affecting the above described land.

January 15, 1954

Colonel C. H. Engelbrecht
Director of Facilities
Adjutant General's Office
Jefferson City, Missouri

Dear Colonel Engelbrecht:

On December 17, 1953, you requested this department to examine an abstract of title compiled and certified to by the Cape Girardeau County Abstract and Title Company, Inc., of Cape Girardeau, Missouri, under date of November 25, 1953, to the following described land located in Cape Girardeau County, Missouri:

"All that part of Out Lot No. 82, U.S.P. Survey 2199, described as follows:

"From the Southeast corner of Lot 6, Block 2, Rodney Vista Subdivision, go South 1 degree 51' West, 1720.3 feet along the West line of Arena Road for a corner; thence South 89 degrees 09' East 80 feet to an iron pin for a corner on the East line of said Arena Road and the point of beginning; thence continuing South 88 degrees 9' East 512.6 feet for a corner; thence South 7 degrees 13' West 339.9 feet for a corner on the North line of State Route "K"; thence North 82 degrees 42' West along the North line of said state route 112.0 feet; thence on the arc of a 6 degree 30' curve to the left, 286 feet to the point of intersection with the East right-of-way line of Arena Road; thence on the arc of a 38 degree 03' curve to the right, 142 feet on the East line of said Arena Road; thence North 1 degree 51' East 223 feet to the point of beginning, containing 3.620 acres, more or less."

This department has examined the above abstract and warranty deed executed by the city of Cape Girardeau, Missouri, a municipal corporation, to the state of Missouri.

Colonel G. H. Engelbrecht

CONCLUSION

This is to certify that merchantable title to the real estate located in the city of Cape Girardeau, Missouri, and as described in a warranty deed from the city of Cape Girardeau to the State of Missouri, dated November 24, 1952, is adequate, subject to no encumbrances, and vests in the State of Missouri, under local laws and ordinances, to the use for which the facility is intended, as of 8:00 a.m., November 25, 1953, subject to a certificate from the clerk of the United States District Court wherein said land is located, showing no pending suits, proceedings, judgments or other liens affecting the above-described land.

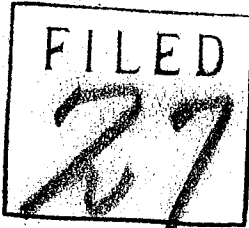
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

COUNTY ROADS:
PRESCRIPTION:



A road which has been in continuous use for over forty years and upon which public money and labor have been spent in such amount as to keep the road passable, is a legally established public road although it was not established by order of the county court. Such a road is confined to that portion actually used as a road bed.

May 24, 1954

Honorable Irvin D. Emerson
Assistant Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

Your recent request for an official opinion is based upon a letter addressed to you by Warren Lynch, County Highway Engineer of Jefferson County. The Lynch letter reads as follows:

"There has been in use in this County for forty years or over a road known as the Byrnesmill Road connecting State Highway No. 30 with the Eureka-Byrnesmill Road. County Judge William Hilgert's father worked the road forty years ago as road overseer. Mr. Frank Hluzek, presently employed by Highway Engineer J. Warren Lynch, worked the road back in 1938. The last work done by the County on the road was in 1946 to the extent of hauling in several loads of gravel.

"There is no record of this road having been established by any action of the County Court of Jefferson County. There are fences several places on both sides of road and the property owners so fenced their land to leave about forty feet of space between fences. In 1928 there was a petition filed to close the road which was made, but rescinded a few months later when the County Court found a defect in the petition. This road is still traveled by the public and is the only access of some property owners along the road. The condition is presently such that in spots the road is safe for only one way traffic. Recently the County Court ordered Warren Lynch, Highway Engineer, to place the road in reasonably good repair. William Knollman, a property owner along the road, ordered the workmen away from in front of his property claiming the road has been abandoned by the County.

Honorable Irvin D. Emerson

"In view of the above, Mr. Warren Lynch, Highway Engineer, wishes to have the following questions answered.

"1. Is this a County Road, and if so what are its boundaries?

"2. If this is not a County Road can the County Court spend County Funds to maintain and repair the road?

"3. What is the liability of the Highway Engineer to the property holder if it is found to be a County Road and he works the road against the wishes of the property owner?

"4. What legal procedure should be followed to establish the boundaries if this is a private road dedicated to public use?"

The situation here is that of a road which, although so far as is known, was not established by order of the county court, has been continuously used for at least forty years, and upon which, from time to time, public labor and money have been expended in maintenance.

We now direct attention to Section 228.190 RSMo 1953, which reads:

"All roads in this state that have been established by any order of the county court, and have been used as public highways for a period of ten years or more, shall be deemed legally established public roads; and all roads that have been used as such by the public for ten years continuously, and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads; and nonuser by the public for five years continuously of any public road shall be deemed an abandonment and vacation of the same."

Obviously the road in the instant case comes within the definition of a legally established road as given in Section 228.190, supra.

Honorable Irvin D. Emerson

The latest decision that we have found construing the above section is the 1952 Springfield Court of Appeals case of George et al. vs. Crosno, 254 S.W.(2) 30. That case held that where no public money or labor had been expended on the highway and there was no evidence that the road had been used by the public for ten years prior to March 30, 1887, that it could not be held to be a public highway by prescription.

In the instant case, as we have noted, public money and labor was expended on this road from time to time and as late as 1945. We are unable to find any indication as to how much public labor and money must be expended or how frequently. We deduce that in order to come within the requirement of the cases a sufficient amount of public money and labor must be expended to keep the road in a fit condition for travel.

In the case of Borders v. Glenn, 232 S.W. 1062, at l.c. 1064, the court stated:

"We find that in the case of School Dist. No. 84 v. Tooloose, 195 S.W. 1023, that the Supreme Court has held that, even in the absence of any order made in the county court's office concerning a road, or any expenditure of public money or labor on the road, it may yet become a public road by prescription or by estoppel in pais, where it is shown that the owners along the road have treated it as a public road, and have permitted the traveling public and the neighborhood to so treat such traveled way. In that case, as in this, the road had been used by the public for a great number of years. It had been kept in a usable condition by the residents of the district who used it for their own accommodation. A schoolhouse had been located on the road for a great number of years, to which the children and those going to and from school constantly traveled the road; that the road had been fenced by the defendant in each of the cases. In that case it was said, and we think it most applicable here:

"All that is necessary to be shown in such cases is an adverse use on the part of the public, either for a sufficient time to create a bar under the statute of limitations, or a user by the public under such circumstances and for such a period of time, with the acquiescence of the owner, as to imply on his part a dedication of the land and a prescriptive right there-to on the part of the public by its acceptance and ap-

Honorable Irvin D. Emerson

propriation as a public highway, all of which may be shown by facts and circumstances, as well as positive proof.'

"(3) This case clearly declares the law to be that where a landowner permits the public to travel over a portion of his land, using it as a roadway, where he permits for years, without any objection, the location of public houses such as churches, schoolhouses, etc., on such traveled way, and, without objection, permits those going to and from these institutions, and then sets that portion of ground apart between fences, and permits uninterrupted travel by any one who wants to use it as a road and highway, will be denied the right to afterwards gainsay that it was a public road. The law will imply a dedication on his part; and, he and the public having done these things which would be done if it was a public road, he will be estopped from denying that it is a public road after these, acting upon the theory that it was a road, have made improvements, and have by use and travel shown a manifestation to accept the implied dedication."

In view of the above, and on the basis of the facts submitted to us by you, we feel that the road in the instant case is a legally established public road.

The next question is as to its boundaries. In the case of Eckerle et al. vs. Perry, 297 S.W. 424, at l.c. 425, the court stated:

"* * * When the public acquires a right to a roadway by prescription that right extends only to the land actually used for road purposes. It is entirely different when a road has been established by condemnation or statutory dedication. In that event the public has the right to the entire road so condemned or dedicated regardless of whether or not the entire width of the road, as established, is actually used for travel. California Road Dist. v. Bueker (Mo. App.) 256 S.W. 98; Id. (Mo. App.) 282 S.W. 71; State v. Thompson, 91 Mo. App. 329; Hall v. Flag Special Road Dist., 296 S.W. 164, decided by this court at this term but not officially reported; Johnson v. Rasmus, 237 Mo. 586, 141 S.W. 590; C.J.Vol. 29, Sec. 6, p. 374."

Our answers to your questions are:

Honorable Irvin D. Emerson

(1) The road in question is a county road, and its boundaries are the land lying beyond that portion of the road which is actually used as a road bed.

(2) This question is answered by our answer to your first question.

(3) Since this is a county road, the county highway engineer has a right to go upon it and improve it, and will incur no liability by so doing.

(4) Your fourth question is moot in view of our holding that this is a public road.

CONCLUSION

It is the opinion of this office that a road which has been in continuous use for over forty years and upon which public money and labor have been spent, in such amount as to keep the road passable, is a legally established road although it was not established by order of the county court. Such a road is confined to that portion actually used as a road bed.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

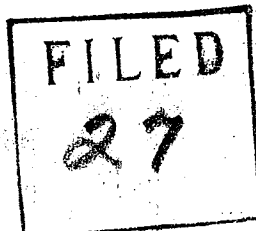
Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

LOTTERY: An operation whereby an automobile dealer gives a prize to the person who supplies the largest number of prospective purchasers who actually purchase an automobile does not contain the element of chance and is therefore not a lottery.

October 22, 1954



Hon. Irvin D. Emerson
Assistant Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"This office has been requested to give an opinion as to whether or not a certain promotion plan contemplating being used by auto dealers of this county constitutes lottery.

"The plan is to give each purchaser of a new automobile a prospect book containing cards. The owner of each automobile purchased is privileged to furnish the dealer with names and addresses of prospective purchasers. Such information will be placed upon the cards and mailed to the dealers.

"At the end of the year, the owner of the newly purchased automobile who has furnished the dealer with the largest number of prospects who have actually purchased a new car from the dealer, will be entitled to a new automobile in exchange for his old one, and without additional consideration. The other new car purchasers who have furnished to the dealer prospects who have purchased a new automobile, will be paid the sum of one dollar for each prospect whose name was furnished to the dealer and who, in fact, purchased a new automobile.

Hon. Irvin D. Emerson

"Your opinion on this question will be appreciated by this office."

The question to be determined from the facts submitted is whether or not the procedure outlined would be in violation of Section 563.430 RSMo 1949, which section reads as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

In the case of State ex inf. McKittrick, Attorney General, v. Globe Democrat Publishing Company, 110 SW 2d 705, 1.c. 713, the Supreme Court of Missouri stated:

"The elements of a lottery are: (1) Consideration; (2) Prize; (3) Chance."

The absence of any one of the three elements above mentioned would remove a particular plan, scheme or transaction from the operation of Section 563.430. Therefore, for the sake of brevity, we shall first examine the procedure outlined to determine if the element of chance is present.

The term "chance," as it relates to lottery statutes, has been defined in 6 Words and Phrases, 1954 Cum. Supp. p. 142, as follows:

"The 'chance,' which is an essential element of lottery, is the antithesis of that

Hon. Irvin D. Emerson

which happens by plan or design or by the exercise of volition or judgment. Com. v. Laniewski, 98 A. 2d 215, 217, 173 Pa. Super. 245.

"As an essential element of a lottery, the word 'chance' refers to attempt to attain certain ends, not by skill or known or fixed rules, but by happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity. U.S. v. Rich, D.C.Ill, 90 F. Supp. 624, 627.

* * * * *

"'Chance,' as element of lottery, is something that befalls as result of unknown or unconsidered forces, a happening in a particular way, issue of uncertain conditions, a fortuity, an unforeseen or inexplicable cause or its operation, or an accident. Minges v. City of Birmingham, 36 So. 2d 93, 96, 97, 251 Ala. 65."

Applying the above-noted definitions we are compelled to the conclusion that the element of chance is lacking in the procedure described. Certain fixed rules govern the awarding of the prize. The person who supplies the automobile dealer with the largest number of prospects who actually purchase a new car from the dealer within a time certain is allowed to exchange his automobile for a new one. Such a result is not, in our opinion, inexplicable nor incapable of ascertainment, but may be accomplished by means of human foresight or ingenuity. Having reached the conclusion that the element of chance is absent, we are of the opinion that the scheme or procedure outlined does not constitute a lottery as contemplated by Section 563.430.

CONCLUSION

Therefore, it is the opinion of this office that an operation whereby a person who purchases a new automobile is given a book containing cards upon which said purchaser lists and submits to the dealer prospective buyers, and whereby the person who submits the greatest number of prospective purchasers who actually purchase a new automobile within a fixed time is

Hon. Irvin D. Emerson

allowed to exchange, without cost to himself, his automobile for a new one, does not constitute a lottery, since the element of chance is absent.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG/vtl

RECORDERS:
THIRD CLASS
COUNTIES:

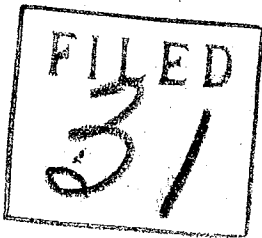
If the recorder of a third class county does not earn the sum of \$4,000.00 in fees in 1953, he is not entitled to the total sum, or to any portion of the sum, of \$750.00, provided in Section 59.250 S. B. 42 of the 67th General Assembly.

February 5, 1954

Honorable W. C. Frank
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Sir:

In your recent request for an official opinion you state:



"I am today in receipt of your report and digest of opinions Vol. XI, No. 4, January 28, 1954, and am particularly interested in opinion No. 14-54 regarding the compensation of recorders in a Class III county.

"Our recorder did not earn the sum of \$4,000.00 for the year 1953 in the County Court. And the County Court refused to pro-rate the \$750.00 allowed the recorder under Section 59.250 RSMo 1949, for performance of the duties imposed on him as provided under Section 59.365 R.S.Mo. 1949 for the reason that he did not earn \$4750.00. The question is, if the recorder does not earn \$4000.00, is he entitled to the compensation of \$750.00 per year as provided by Section 59.250 R.S.Mo. 1949 for the performance of the duties as set out in Sec. 59.365 R.S.Mo, 1949.

"Possibly the above opinion referred to in its entirety, touches this point, or possibly you have an opinion on this point, but if not, I would appreciate an opinion from your office advising whether or not a recorder in a county of Class III who earns less than \$4000.00 is entitled to the \$750.00 as provided in Sec. 59.250 R.S.Mo. 1949."

Section 59.250 RSMo 1949, to which you refer, reads:

"1. The recorder of deeds in counties of the third class, wherein there is a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received. He shall make a report thereof each year to the county court.

Honorable W. C. Frank

"2. All other fees over and above the sum of four thousand seven hundred fifty dollars for each year of his official term, seven hundred fifty dollars of which shall be compensation for the performance of duties imposed by section 59.365 and four thousand dollars for other duties imposed by law, shall be paid into the county treasury after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary."

From the above it seems to us to be plain that the meaning of the above section is that the recorder is allowed to retain \$4750.00 in fees, if he collects that much in fees, and that all fees over that amount are by him to be turned in to the county treasury. If, for example, the amount collected is \$2450.00, that would be the amount retained by the recorder. If, as in your situation, the amount collected in fees is under \$4000.00, then we do not believe that the recorder would be entitled to any part of the \$750.00.

CONCLUSION

It is the opinion of this department that, if the recorder of a third class county does not receive the sum of \$4000.00 in fees in 1953, he is not entitled to any portion of the sum of \$750.00 provided in Section 59.250, S. B. 42 of the 67th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

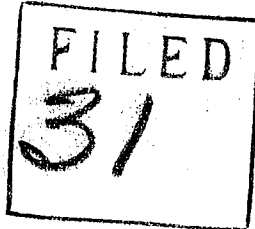
Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

INHERITANCE TAX:

Method of computing Missouri Inheritance
Tax on trust estates.



March 19, 1954

Honorable W. C. Frank
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading in part as follows:

"We have an inheritance tax appraisal pending in connection with an estate being administered in the Probate Court of Adair County and the ascertainment of the correct tax involves some rather complicated legal problems and as Prosecuting Attorney of Adair County, I request your opinion in the premises.

"The deceased, by last will and testament, left the rest and residue of the property of which he died seized to three trustees. The trust instrument providing:

"My said Trustees shall make available to my said wife, such sum or sums as she may need for her proper care, comfort and support during her lifetime and for that purpose may expend any amount of the principal that they may determine is so needed. It being my primary intention that my said wife throughout her lifetime shall have from such trust estate whatever may be necessary for her proper care, comfort and support and I

Honorable W. C. Frank

declare that the provisions for disposition of the remainder are secondary in importance.

"At the death of my said wife, the remaining trustees shall after the payment of her burial expenses and the expenses of her last illness, divide the assets remaining in their hands equally between Ruth Tinsman, my niece, Wilmont S. Tinsman, my great nephew, James Tinsman, my great nephew, Marietta Jonas Jayne, my wife's niece, and Harry S. Jonas, Jr., my wife's nephew, and I now give, devise and bequeath the remaining assets in such trust estate to said named parties in equal parts and subject to the use to which my said trustees shall make of the same under the authority herein given them."

"The property is valued at something in excess of \$100,000 and the widow, at the time of her husband's death, was 73 years of age. * * *

"Your aid and assistance by way of an opinion in the premises will be greatly appreciated."

The answer to your question will depend upon the determination of the nature of the bequest to the widow. We have examined the phraseology employed in the will of the decedent under which the trust was created and have reached the conclusion that thereby a completed gift in praesenti of the entire corpus of the trust estate became effective. We are persuaded to this view by reason of the incorporation in the trust provisions of the power granted to the trustees to encroach upon the principal to any extent which such trustees may deem necessary for the maintenance of the widow and to insure her proper care, comfort and support. We also feel it significant that the testator contemplated the possibility of the complete exhaustion of the trust estate during the lifetime of the widow, as is evidenced by his declaration that the executory contingent distribution of the remainder

Honorable W. C. Frank

of the estate was of secondary importance. From the foregoing we believe that the entire value of the corpus of the trust estate should be taxed against the widow after the allowance of her statutory marital exemptions.

We believe that the provisions of Section 145.230, RSMo 1949, are pertinent to the determination of the liability of this portion of the estate for inheritance tax and that such statute offers some guide to the procedure to be followed upon the decease of the widow if any of the trust estate at such time be unexpended. This section reads as follows:

"In determining the value of any estate, property, interest therein or income therefrom to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled, no allowance shall be made on account of any contingent encumbrance thereon, nor on account of any contingency upon the happening of which the estate, property, interest or income or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such encumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgement, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the persons properly entitled thereto of a proportionate part of such tax on account of the encumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section 145.250 upon order of the court having jurisdiction."
(Emphasis ours.)

There yet remains the question which arises with regard to the imposition of any tax upon the contingent remainders which have been provided in the will in favor of the persons named therein. We believe that Subsections 2 and 3 of Section 145.240, RSMo 1949, are germane to the subject and we therefore quote them verbatim:

Honorable W. C. Frank

"2. When the property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are wholly dependable upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the lowest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this chapter, and such tax so imposed shall be due and payable forthwith by the executor, administrator, or trustee out of the property transferred; provided, however, that on the happening of any contingency or condition whereby the said property or any part thereof is transferred to a person or corporation, which under the provisions of this chapter is required to pay a tax at a higher rate than the tax imposed, then such transferee shall pay the difference between the tax imposed and the tax at the higher rate, and the amount of such increased tax shall be enforced and collected as provided in this chapter; provided further, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this chapter, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this chapter. Such return of overpayment shall be made in the manner provided by section 145.250, upon the order of the court having jurisdiction.

"3. Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished

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value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estate for purposes of taxation, upon which said estates in expectancy may have been limited. Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting."

You will note that under Subparagraph 2 quoted supra, the taxes required to be computed upon the basis of the lowest rate upon which was the happening of any contingency, would be applicable. Having determined that the entire trust estate should be treated primarily as a bequest to the widow for purposes of inheritance taxes it therefore appears that no tax should be assessed upon the contingent remainders at this time. In the event that at the time of the decease of the widow there remains a portion of the trust estate which is subject to distribution to the named contingent beneficiaries, then the inheritance tax upon such contingent remainders will be determined in accordance with the provisions of Subsection 3 of Section 145.240, RSMo 1949, quoted supra.

One further question presents itself although not mentioned in your letter of inquiry. If the tax be assessed in the manner set forth in this opinion there is a distinct possibility that the widow will pay a greater tax than that actually owed. This situation would result from the death of the widow without having received the benefit of the entire trust estate having been expended in her behalf. However, we believe that adequate provision has been made for the refund of any such tax subsequently found to be excessive under the provisions of Section 145.230, RSMo 1949, quoted supra. You will note in this section a reference to the method to be followed in securing the refund of the tax. Such refunds are provided for in the statute mentioned, namely, Section 145.250, RSMo 1949, which reads as follows:

"When any tax shall have been paid erroneously to the director of revenue and satisfactory proof of said erroneous payment is presented to him, the director of revenue shall certify

Honorable W. C. Frank

such claim for refund to the state comptroller, who shall verify the same and issue a warrant for the amount of such tax so erroneously paid, payable to the executor, administrator, or trustee, person or persons who paid the same, and the state treasurer shall pay such warrant out of any funds appropriated for such purposes; provided, that all applications for the refund of said tax shall be made within two years from the date of the accrual of the right to such refund."

CONCLUSION

In the premises we are of the opinion that the corpus of testamentary trust provided for the benefit of a widow, as to which the trustees thereof have unlimited power of encroachment for the purpose of providing care and comfort and support during the lifetime of such widow and for the payment of burial expenses and expenses incident to the last illness of such widow after her decease, is to be taxed for Missouri Inheritance Tax purposes as a bequest to the widow at the full value of the principal of such trust estate, less the statutory marital exemptions allowed such widow.

We are further of the opinion that no tax should be assessed upon the contingent remainders limited over to persons taking the residuum of such trust estate remaining unexpended at the time of the decease of the widow but that the tax upon such contingent remainders shall be computed at the time that the beneficial interest in such residuum shall actually come into the hands of such contingent remaindermen.

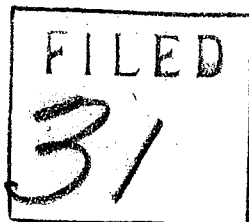
The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB:vlw

COUNTY DEPOSITARY: Accounts maintained by the county treasurer and ex-officio collector in a different capacity and right are insured up to \$10,000 by the FDIC; COUNTY FUNDS: county court should select new depositary where depositary fails to qualify; selection not necessarily limited to banks within this state.



April 26, 1954

Honorable William Y. Frick
Prosecuting Attorney
Putnam County
Unionville, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office which request reads, in part, as follows:

"I respectfully request an opinion from your office construing Section 362.490, V.A.M.S., 1949, and Section 110.010, V.A.M.S., 1949, as applied to the following fact situation.

"Putnam County operates under township organization. Consequently our treasurer is also ex-officio collector. All moneys coming into his hands are, as of this date, deposited in the Farmers Bank of Unionville, Missouri. He maintains a collectors account, a treasurers account, a library account, and about thirty-five King Road accounts.

* * * * *

"The questions which I hope you can resolve for me are as follows:

"1. Inasmuch as only the three enumerated accounts of the total of thirty-five maintained ever exceed the sum of \$10,000.00, the amount of FDIC liability, can Section 362.490 be construed so as to make it proper for the bank to pledge securities in an amount equal only to those accounts exceeding \$10,000.00, less the \$10,000.00 for each of them, and thereby be in compliance with the above statute, or is the \$10,000.00 of FDIC liability applicable only to all county

Hon. William Y. Frick

deposits in a lump sum, regardless of the number and size of the accounts into which it might be divided?

"2. Should the above mentioned bank refuse to comply with Section 110.010, does the County Court have any choice but to select another depository for county funds? (In this connection, it should be noted that according to the Missouri cases decided upon this subject, failure to comply with the various statutes with regard to depositories of county funds places the counties claim against a defunct bank in the preferred class)

"3. In the event the county court should select a new depository, are they limited in their choice to banks located within this State."

Section 110.010, RSMo. 1949, provides as follows:

"1. Notwithstanding any provisions of law of this state or of any political subdivision thereof, the public funds of every county, township, city, town, village, school district of every character, road district, drainage or levee district, state hospital, Missouri State School, Missouri School for the Deaf, Missouri School for the Blind, Missouri Training School for Boys, Industrial Home for Girls, Confederate Soldiers' Home, Federal Soldiers' Home, Missouri State Sanatorium, earnings of Missouri Penitentiary, state university, Missouri state teachers' colleges, Lincoln University, which shall now or hereafter be deposited in any banking institution acting as a legal depository of such funds under the provisions of the statutes of Missouri requiring the letting and deposit of the same and the furnishing of security therefor, shall be secured by the said legal depository making deposits, as provided in section 110.020, of securities of the same character as are required by section 30.270, RSMo. 1949, and all amendments thereto for the security of funds deposited by the state treasurer under the provisions of section 30.240, RSMo. 1949, and all amendments thereto.

Hon. William Y. Frick

"2. The said securities shall, at the option of the depositary banking institution, be delivered either to the fiscal officer or the governing body of the municipal corporation or other depositor of said funds, or by depositing such securities with such disinterested banking institution or safe depositary as trustee as may be satisfactory to both parties to the depositary agreement.

"3. The rights and duties of the several parties to the depositary contract shall be the same as those of the state and the depositary banking institution respectively under section 30.270, RSMo 1949, and all amendments thereto; provided, however, that in the event a depositary banking institution should deposit the bonds or securities with a trustee as above provided, and the municipal corporation or other depositor of funds shall give notice in writing to the trustee that there has been a breach of the depositary contract and shall make demand in writing on the trustee for the securities, or any part thereof, then the trustees shall forthwith surrender to the municipal corporation or other depositor of funds a sufficient amount of such securities as may fully protect the depositor from loss and the trustee shall thereby be discharged of all further responsibility in respect to the securities so surrendered."

Section 362.490, provides as follows:

"Notwithstanding any provision of law of this state or of any political subdivision thereof requiring security for deposits in the form of collateral, surety bond or in any other form, security for such deposits shall not be required to the extent said deposits are insured under the provisions of an act of congress creating and establishing the Federal Deposit Insurance Corporation or similar agency created and established by the congress of the United States."

You first inquire whether the Federal Deposit Insurance Corporation liability applies to separate accounts or all county deposits in a

Hon. William Y. Frick

lump sum. In this regard we direct your attention to Title 12, Chapter 16, Section 1813, U.S.C.A., which provides in part as follows:

"(m) The terms 'insured deposit' means the net amount due to any depositor for deposits in an insured bank (after deducting offsets) less any part thereof which is in excess of \$10,000. Such net amount shall be determined according to such regulations as the Board of Directors may prescribe, and in determining the amount due to any depositor there shall be added together all deposits in the bank maintained in the same capacity and the same right for his benefit either in his own name or in the names of others except trust funds which shall be insured as provided in subsection(1) of section 1817 of this title. Each officer, employee, or agent of the United States, of any State of the United States, of the District of Columbia, of any Territory of the United States or Puerto Rico, of the Virgin Islands, of any county, of any municipality, or of any political subdivision thereof, herein called 'public unit', having official custody of public funds and lawfully depositing the same in an insured bank shall, for the purpose of determining the amount of the insured deposits, be deemed a depositor in such custodial capacity separate and distinct from any other officer, employee, or agent of the same or any public unit having official custody of public funds and lawfully depositing the same in the same insured bank in custodial capacity."

In construing this provision in the case of Billings County vs. Federal Deposit Ins. Corp., 71 Fed. Supp. 696, the court said, at l.c. 700:

"One of the purposes of this section was to make a separate insured deposit of an account maintained by a depositor in a different capacity and a different right from that in which such depositor maintained some other account. Were that not true, the statute would have provided that the amount due any depositor should be determined by adding together all deposits maintained in the bank by such depositor. Here the statute specifically says that the amount due shall be determined by adding together 'all deposits in the bank maintained in the same capacity and the same right.'"

We refer also to Section 303.3 of the 1946 Supplement to Title 12 Code in Federal Regulations adopted under authority of Section 1813, Chapter 16, Title 12, USCA., which provides as follows:

"The owner of any portion of a deposit appearing on the records of a closed bank under the name of a public official, State, county city, or other political subdivision will be recognized for all purposes of claim for insured deposits to the same extent as if his name and interest were disclosed on the records of the bank: Provided, that the interest of such owner in the deposit is disclosed on the records maintained by such public official State, county, city or other political subdivision and, provided further, that such records have been maintained in good faith and in regular course of business."

Concerning this regulation the court in the Billings County case noted supra, said, l.c. 702:

"As counsel for the defendant point out, the regulation has reference to a situation where there would be a number of municipalities or entities which have a common treasurer who must have deposited in a commingled single account in an insured bank all of the funds from this number of independent, separate municipalities * * *."

See also the case of Federal Deposit Ins. Corp. v. Casady, 106 Fed. 2d. 784.

In view of the above noted provision, and the court interpretation given thereto, it is our opinion that the \$10,000 F.D.I.C. liability applies separately to accounts maintained by a depositor in a different capacity or right. Consequently, under the provisions of Section 362.390, RSMo. 1949, the depository need only pledge securities in an amount equal to the amount that a separate insured account, or accounts, exceed \$10,000 and of course no security would be required on a separate insured account which does not exceed \$10,000.

Section 110.040, provides as follows:

"In the event that there shall be no banking corporation, association, trust company or individual banker in the territory within which the depository or depositories of any public fund must, under the applicable laws of this state, be located to become eligible for selection, or in the event that the selected depository or depositories within such territory shall fail or accept such award or awards of such public funds as may be made, then the authority or authorities which are by law empowered to make such selection of depositories and

Hon. William Y. Frick

awards of public funds thereto, are authorized and empowered to select as depositary or depositaries such banking institutions located outside the territorial limits aforesaid as such authority or authorities may deem the safest and most convenient depositary or depositaries for such public fund."

In view of the above provision we are of the opinion that if a depositary selected refuses to pledge the required security the county court should select another depositary which will comply with this requirement.

You next inquire whether in selecting a depositary the county court is limited in its choice to banking institutions located within the territorial limits of this state. We have examined the provisions relating to county depositaries and while we find no affirmative legislative enactment authorizing such selection we are of the opinion that, provided all provisions relating to the selection and qualification of a depositary are otherwise complied with, there would be no prohibition against designating an outstate bank.

CONCLUSION

Therefore, it is the opinion of this office that the \$10,000 Federal Deposit Insurance Corporation liability applies to each separate account maintained by the county treasurer and ex-officio collector in a different capacity and in a different right from that in which such depositary maintains some other account and under the provisions of Section 362.490, a depositary need only pledge security for those amounts which are not subject to F.D.I.C. coverage.

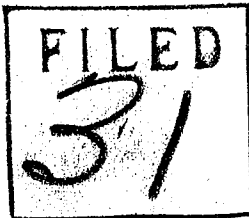
It is the further opinion of this office that if a depositary selected fails to pledge the required security, the county court should select another depositary for the county funds and that in making such selection, the county court is not limited to a depositary located within the territorial limits of this state if all other provisions relating to the selection and qualifications are otherwise complied with.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

JOHN M. DALTON
Attorney General

OLD AGE ASSISTANCE:
SOCIAL SECURITY COM-
MISSION:



The ownership of saleable real estate whose value is in excess of \$500, which real estate is not lived on by the owner, constitutes an available resource as that word is used in paragraph 5 of Section 208.010 RSMo Cumulative supplement 1953, and would render its owner ineligible for old age assistance.

June 23, 1954

Senator Arkley W. Frieze
Carthage,
Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"I would like to have this considered as a request for an opinion from your office in relation to the construction of Section 208.010, Revised Statutes of Missouri, which was approved by the Governor on June 19, 1953. That section provides in part as follows, in relation to eligibility for Old Age Assistance:

"Benefits shall not be payable to any person who:
(2) Owns or possesses cash or securities in the sum of \$500.00 or more, provided, however, that if such person is married and not separated from spouse, he or they, individually or jointly, may own cash or securities of a total value of \$1000.00
* * *."

"Subsection 5 of Section 208.010 provides:
"Has earning capacity, income or resource, whether such income or resource is received from some other person or persons, gifts or otherwise, sufficient to meet his needs for a reasonable subsistence compatible with decency and health."

"An administrative determination by the local welfare office has been made in which it was concluded that if the applicant had real estate upon which he was not living, that this constituted an available resource and disqualified him, even though the value of the real estate was not over the statutory maximum allowed to applicant."

Senator Arkley W. Frieze

"The factual situation upon which this request is based is as follows: 'F', an applicant for Old Age Assistance, owns a small tract of land in this county upon which he does not live, but which has been appraised as having a fair market value of approximately \$1750.00. The total value of the property owned by the applicant is less than \$5000.00, which is presently authorized by law. However, the Department of Welfare has taken the position that under the law, the applicant has an available resource in the real estate upon which he does not reside and for that reason has denied his application for Old Age Assistance. The question thus presented is whether applicant, under the existing circumstances, is entitled to Old Age Assistance or whether he is ineligible because of the ownership of the real estate upon which he does not reside.

"From my examination of the authorities, I fail to find any expression by the upper courts of Missouri in relation to real estate which is owned by the applicant but upon which he does not reside. However, the case of Miller vs. Social Security Commission, 151 S.W. (2) 457, expressly holds that the applicant in that case was not rendered ineligible by reason of the fact that he had a life insurance policy with a cash surrender value of over \$500.00. By analogy it would certainly appear that real estate owned by an applicant but upon which he does not reside, could not be considered as disqualifying.

"The opinion of your office upon this problem is a vital one to a good many of the people living in this part of the state, and an early reply will be deeply appreciated."

The bare issue which you raise is whether the ownership of real estate, upon which the applicant for old age assistance does not live, which real estate is saleable and of the approximate value of \$1750, constitutes a "resource," as that word is used in paragraph 5 of Section 208.010, RSMo, Cumulative Supplement 1953, sufficient to disqualify the applicant.

We note your reference to the case of Miller v. State Social Security Commission, 151 S.W. (2d) 457. That case makes two

Senator Arkley W. Frieze

holdings. One is that a life insurance policy, with a cash surrender value, is not a negotiable security as that term was used in paragraph 2 of Section 9406 RSMo. 1939; and that an insurance policy, with a cash surrender value, should be considered as "property", as that term was used in paragraph 3 of the above section, which is now Section 208.010 RSMo, Cumulative Supplement 1953. The court failed to consider whether such an insurance policy was a "resource", as that term was used in paragraph 6 of the above section. We feel that such a consideration should have been given.

In the case of Parks v. State Social Security Commission, 160 S.W. (2d) 823, at l.c. 825, the court in its opinion said:

"Claimant's application for assistance must be tested not only by one of the disqualification clauses of section 9406 but all of them, including clause 6. Clauses 1 to 6 are all disqualifying clauses and are of equal weight and, if claimant is disqualified under any one of them, he is not entitled to old age assistance. Chapman v. State Social Security Commission, 235 Mo. App. 698, 147 S.W. 2d 157, 162."

In view of the above, we feel therefore that the situation in your case must be tested in the light of paragraph 5 of Section 208.010, supra, which is now the "resources" paragraph, as well as by all the other parts of the section. At this point it becomes necessary for us to look at Rule 13 of the Division of Welfare. That rule reads as follows:

"Real Property as an Available Resource

"(See Manual Section V)

"When an applicant or recipient owns real property which is not furnishing shelter for him, and its value is less than the statutory maximum, but its current market value is \$500 or more if owned by a single person or \$1000 or more if owned by a married person living with spouse, it shall be considered as a resource and the claimant will not be eligible for assistance on the basis of need, provided all of the following criteria which apply are met (the value of an equity in a life estate and of burial lots shall be excluded from this computation);

"(a) For real property in which the applicant or recipient has lived;

"1. 24 months have elapsed since the last date on which either the claimant or spouse have occupied the dwelling; except that the

24-month rule will not apply when a claimant or couple owns two pieces of property and lives part-time in each property - they shall be required to designate one of the properties as their home and the other property shall then be considered as an available resource immediately; also when a claimant purchases a second piece of property and uses it as a home, or when two claimants marry each of which owns the home in which he or she has been living - in such cases the vacated home shall be considered as an available resource immediately.

"2. For town or city property, lots on which there is no dwelling and which adjoin the residence and considered a part of the home (regardless of the number of lots so long as they are in the same city block);

"3. For rural property, the acreage on which the home is located, plus any adjoining acreage which is a part of that farming unit will be considered as part of the home. (Property will be considered as adjoining even though a road may separate two tracts, if the property is farmed as a single unit).

"(b) For all other real property:

"The property is not being used directly by the applicant or recipient in the course of his employment. (Revised April, 1954)."

It is clear that under the above rule the applicant, (whom we assume from your letter to be a single person), in the instant case, is not eligible for old age assistance. He owns real property which is not furnishing him shelter, and the current market value of such property clearly appears to be in excess of five hundred dollars.

You do not in your letter raise any question as to the authority of the division of welfare to enact Rule 13, but in view of the very important effect that this rule is having, and will continue to have, upon the lives of great numbers of people of this state, we feel that we should consider it from this viewpoint. In this regard we direct attention to Section 207.020 RSMo 1949, which reads in part as follows:

Senator Arkley W. Frieze

"(1) The department of health and welfare through and on behalf of the division of welfare shall have the power: * * * (1) to adopt, amend, and repeal orders and findings not inconsistent with the Constitution or laws of this state. * * *"

Under authority of the above, Rule 13 was enacted. The test of Rule 13, as stated above, is whether it is in conflict with the Constitution of Missouri, or any law of Missouri. If it be in conflict with any law, that law obviously would be the social security law, which is Chapter 208 RSMo 1949, and we believe more specifically Section 208.010 of that chapter, with which section we are familiar.

A factual situation parallel to the instant case arose in California in 1945 in Newbold vs. Social Welfare Board, 174 Pac.(2) 482. In that case, the Social Welfare Board promulgated a regulation providing that Aid to the Blind could not be granted where cash or securities owned were in excess of \$600.00, unless there was a plan for, and the ability to provide for, rehabilitation. The Plaintiff sued out a writ of mandamus contending that the regulation of the Board was in conflict with Section 3047 of the Welfare and Institutions Code, which provided in part as follows: "Aid shall not be received under the provisions of this chapter by any person who owns personal or real property, or both, the county assessed valuation of which, less all encumbrances thereon of record, is in excess of three thousand dollars (\$3000)."

The Superior Court of Orange County sustained the petitioner's contentions. The court said: "It is my opinion that the Social Welfare Board in adopting Section 142-05 of the Manual of Procedures, Rules and Regulations acted in an arbitrary manner, and that its above-numbered section is inconsistent with and in conflict with the suitable provisions of the Welfare and Institutions Code of California pertaining to needy blind persons, in that such rule modifies the statute in an unwarranted fashion. Furthermore, it is my opinion that assuming the Board to have had the power to adopt a rule, the effect of which would be to modify the statute, it is clear that an administrative body may not by the adoption of a rule of policy or procedure to subscribe or curtail the exercise of its discretion as to prevent the free exercise thereof in every case, and in my opinion by the adoption of a rule, the effect of which is to state that no blind person having \$600 in cash and securities is needy, the Board has assumed to itself a legislative function."

Upon appeal, the decision of the superior court was reversed. The appellate court held that Section 3047 was intended to set only the maximum amount which an individual might own and yet be eligible to receive blind aid, and that the State Social Welfare Board had discretion to fix by regulation a lesser amount as a maximum for

Senator Arkley W. Freize

eligibles, taking into consideration the other provisions of the statute, particularly that provision which required that aid should be granted only to those who are in need. It was further ruled that such a regulation was not in conflict with said Section 3047, and was neither unreasonable, arbitrary, nor capricious. It is to be noted that the California statute did not contain a specific disqualifying clause declaring a person ineligible who had resources to provide a reasonable subsistence as the Missouri law does provide. The validity of the California regulation was ruled upon under the general provision in their law that an applicant had to be in need. We think the ruling made by the California Appellate Court presents the proper perspective to hold in view in construing the Missouri Social Security Law relative to the evaluation of resources and determination of who is "a needy person".

The regulation does not prohibit the ownership of a home in which the applicant resides and which has a valuation of \$5000.00. The application of this regulation insures that persons in similar circumstances will receive the same treatment in establishing eligibility to receive benefits, and that there will be no evasion of the law by changing cash assets into real property. Applicants owning cash or cash equivalent (i.e. real or personal property convertible into cash) are measured by the same eligibility yardstick. Rule 13 is a reasonable rule and regulation to effectuate the provisions of the law, and, in view of the necessity and propriety of considering the State Social Security law as a whole, it cannot be said that this regulation is in conflict with the provisions of the State Social Security Law, nor specifically with the provisions of Section 208.010.

CONCLUSION

The ownership of saleable real estate whose value is in excess of \$500, which real estate is not lived on by the owner, constitutes an available resource as that word is used in paragraph 5 of Section 208.010 RSMo, Cumulative Supplement 1953, and would render its owner ineligible for old age assistance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

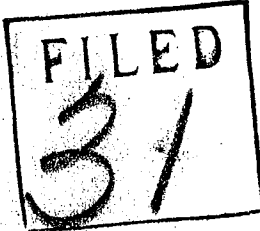
Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

CRIMINAL LAW: Nine questions regarding criminal procedure.

July 21, 1954



Honorable Arkley W. Prieze
Member, Missouri Senate
Carthage, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading in part as follows:

"I would like to have an opinion from your office upon the following matter.

"Several years ago a man who is presently confined in the State Penitentiary under a 99-year sentence was paroled. In June, 1952, this accused was arrested in Joplin on two charges of burglary and larceny, one charge of possession of burglary tools and one grand larceny charge. He was arraigned before the magistrate at Joplin, requested that he be granted a preliminary examination on each of the charges against him, the charges were set down for hearing on June 20, 1952, and the accused was committed to the jail of Jasper County in default of appearance bonds. Shortly thereafter, the Prosecuting Attorney brought to the attention of the State Board of Probation and Parole the charges against the accused. An order was issued by the State Board of Probation and Parole revoking the parole theretofore granted the accused and ordering his recommitment to the State Penitentiary. On June 19, 1952, the Sheriff and Prosecuting Attorney of Jasper County voluntarily surrendered the accused to an agent of the

Honorable Arkley W. Frieze

Warden of the Missouri State Penitentiary, and on that date he was transported to Jefferson City, Missouri, and recommitted to the State Penitentiary, where he is presently held. On June 20, 1953, the docket entries of the Magistrate Court show that the Prosecuting Attorney's office advised the court that the accused was again in the State Penitentiary, and at the request of the Prosecuting Attorney, the charges were continued indefinitely. On June 23, 1952, alias warrants for the arrest of the accused were issued by the magistrate. Approximately the 1st of January, 1953, the accused wrote the magistrate and Prosecuting Attorney, asking that he be given preliminary hearings on these charges. No action was taken and a few weeks ago, motions were filed on behalf of the accused for his discharge because he was not brought to trial within three terms of court and for the failure of the state to prosecute him. The magistrate held, and I believe quite properly, that the statute requiring a defendant to be brought to trial within three terms of court only applied after indictment or information had been filed in the Circuit Court. Thereafter, the accused filed an application for a Writ of Habeas Corpus Ad Testificandum before the magistrate, which the magistrate dismissed upon the ground that he had no authority to issue such a writ that was directed outside of the county. Thereafter, application for Writ of Habeas Corpus Ad Testificandum was applied for in the Circuit Court of Jasper County, Missouri, seeking the return of the accused to the Magistrate Court here in Jasper County. The Circuit Court was of the opinion that he had no authority to issue the writ directing the appearance of the accused in another court, but indicated that in his judgment, mandamus would lie to compel the magistrate to hear and consider the application for habeas corpus. Thereafter, a Writ of Mandamus was issued by the Circuit Court, directed to the Judge of the Magistrate Court, ordering the magistrate to entertain the writ, which has been issued.

Honorable Arkley W. Frieze

"I forgot to mention that shortly after the denial of the request of the accused for a dismissal of the charges against him for failure to prosecute and because of the passage of more than three terms of court since the filing of the charges, and his incarceration, the magistrate indicated there might be some basis for urging a dismissal for want of prosecution. Within a few days thereafter, the Prosecuting Attorney, of his own volition, dismissed all of the charges and almost immediately refiled them and had the warrants for the arrest of the accused forwarded to the Sheriff of Cole County, Missouri.

"The Prosecuting Attorney's position, in short, regarding this matter, may be summarized as follows. He presently contends that the magistrate has no authority to issue a Writ of Habeas Corpus Ad Testificandum for the reason, first, that the defendant is not in court because he has not been arrested on the charges; secondly, that he is under no obligation to prosecute or press the charges against the accused until after his present term of confinement has been completed, in accordance with the law; that although he has the authority under the law to return the accused to Jasper County for trial, he is under no obligation so to do. If this be true, I certainly feel that several changes in our criminal laws are in order.

* * * * *

"Thanking you in advance for your past favors and your co-operation in this matter, I am,"

We will set out the questions which you have proposed in order.

Your first two questions are grouped for answering in the following manner:

"1) Under the circumstances as I have outlined them, is the defendant entitled to have the charges dismissed against him for want of prosecution?

Honorable Arkley W. Frieze

"2) Would the passage of more than three regular terms of the Circuit Court of Jasper County, Missouri, under the circumstances, have the legal effect of entitling the accused to a dismissal of the charges so as to act as a bar to further charges for the same alleged offenses?"

From the facts disclosed in your letter of inquiry it is apparent that no information nor indictment is presently pending against the defendant. The statutes which you undoubtedly have in mind are Sections 545.890 and 545.900, RSMo. 1949, reading as follows:

"If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense which shall be held after such indictment found, he shall be entitled to be discharged, so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner, or shall be occasioned by the want of time to try the cause at such second term."

"If any person indicted for any offense, and held to answer on bail, shall not be brought to trial before the end of the third term of the court in which the cause is pending which shall be held after such indictment found, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happened on his application, or be occasioned by the want of time to try such cause at such third term." (Emphasis ours.)

The underscored portions of the statutes quoted clearly indicate that they do not become applicable until an indictment or information has been filed. Therefore in the present case, since no such indictment or information has been filed, we believe that the mere passage of time cannot serve to entitle the defendant to dismissal of the complaint now pending against him.

Honorable Arkley W. Frieze

For convenience we also group your questions three, five, seven and eight, as follows:

"3) Would the magistrate court before whom the original charges were pending from June, 1952, to September, 1953, have the authority to issue a Writ of Habeas Corpus Ad Testificandum upon the application of the accused, directed to the Warden of the State Penitentiary, commanding him to produce the accused in court in order that the charges could be heard or otherwise disposed of?"

"5) Does the Magistrate Court, in the opinion of your office, have authority, under the law, to issue a Writ of Habeas Corpus Ad Testificandum upon the application of the accused in order that he may be present and have the charges prosecuted against him?"

"7) Is the Prosecuting Attorney, under the conditions as I have heretofore outlined them, charged with the duty of either taking the necessary steps to have the accused returned to this county for trial or to dismiss the charges against him?"

"8) Assuming the truth of the facts as I have heretofore set them forth, what remedies, if any, does the accused have, under the law, under the existing circumstances, either to compel the Prosecuting Attorney to try the charges or to have them dismissed for want of prosecution?"

Section 491.230, RSMo 1949, reads as follows:

"Courts of record, and any judge or justice thereof, shall have power, upon the application of any party to a suit or proceeding, civil or criminal, pending in any court of record, or public body authorized to examine witnesses, to issue a writ of habeas corpus for the purpose of bringing before such court or public body any person who may be detained in jail or prison, within the state, for any cause, to be examined as a witness in such suit or proceeding, on behalf of the applicant." (Emphasis theirs.)

Honorable Arkley W. Frieze

Under the provisions of the new Constitution, magistrate courts are, of course, courts of record. Such courts therefore have the authority to issue writs of habeas corpus ad testificandum.

At this point it becomes necessary to determine whether or not at such stage of the proceedings is the cause "pending." In this regard your attention is directed to Rule 23.03, Supreme Court of Missouri, which reads as follows:

"The magistrate before whom an accused is brought shall advise the accused of the charge against him and, if requested, shall read to him the complaint. The accused shall be allowed a reasonable time to advise with his counsel and shall be permitted to send for counsel if he so desires. The magistrate shall proceed, as soon as possible, to examine the complainant and other witnesses produced in support of the prosecution, on oath, and in the presence of the accused, concerning the offense charged. The accused may cross-examine witnesses against him and may introduce evidence in his own behalf. So far as is practicable, the preliminary examination shall be conducted in the same manner as the trial of criminal cases in circuit courts." (Emphasis ours.)

This rule is but in furtherance of the constitutional guaranty of the right to a speedy trial which appears as Article I, Section 18(a), Constitution of 1945, reading as follows:

"That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county." (Emphasis ours.)

In commenting upon this constitutional provision, the Supreme Court of Missouri said in State v. Gallina, 178 S. W. 2d 433, 1.c. 434:

Honorable Arkley W. Frieze

" * * * Prosecuting attorneys, witnesses,
and citizens owe a constitutionally recog-
nized duty to afford an accused a speedy
trial. * * * "

Inasmuch as no information charging a felony may lawfully be filed against a defendant until after such defendant has been accorded a preliminary examination, it seems that the constitutional guaranty encompasses all official action leading up to the ultimate trial. We therefore are of the opinion that the cause is "pending" within the meaning of Section 491.230 RSMo 1949, at least from and after the time for such preliminary hearing has been fixed by the magistrate following the filing of the complaint.

The next question, of course, is whether a person incarcerated under a commitment following conviction on one charge may resort to the writ of habeas corpus ad testificandum for the purpose of having his own body produced in trial in order that he may testify as a witness in his own behalf. It is our opinion that he may do so and that such writ is the proper one to employ for such purpose. In this regard, see paragraph 94, page 151, Church on Habeas Corpus, Second Edition, and cases cited therein. We think that this rule is in accord with other constitutional guaranties relating to the right of confrontation of witnesses, for compulsory process for the attendance of witnesses on behalf of defendants, and for the right to know the nature and cause of the accusation in any criminal case.

The fourth question which you have proposed reads as follows:

"4) Would the Magistrate Court lose jurisdiction over the accused by the long delay from June, 1952, to September, 1953, by reason of an indefinite continuance?"

We find no cases which hold that under the circumstances outlined in your letter of inquiry the magistrate court would lose jurisdiction over the accused during the period of his incarceration in the state penitentiary with respect to a pending complaint on file with such court. We therefore believe that such jurisdiction has not thereby been lost.

The sixth question in your letter of inquiry reads as follows:

"6) When does the Statute of Limitations commence to run against the accused on the charges and under the circumstances as I have hereinbefore outlined them?"

Honorable Arkley W. Frieze

The general rule is that the statute of limitations with respect to criminal prosecution commences to run upon the completion of the crime charged. In your letter of inquiry you have not indicated the date upon which it is alleged that the defendant committed the two offenses of burglary and larceny--the possession of burglary tools, or the grand larceny. In the absence of such information we, of course, cannot state specifically when the statute of limitations would begin to run other than by reference to the general rule mentioned.

Your ninth question reads as follows:

"9) Does the guarantee of the accused in criminal prosecution, as contained in Article One, Section 18A, i.e., to a speedy trial in case of criminal prosecution, include the right to have an indictment or information filed speedily?"

Article I, Section 18(a), is quoted supra. We believe that it is the intent by the inclusion of this constitutional guaranty to assure persons accused of crime of a speedy trial. It is, of course, not every delay or postponement of the trial of an accused that will infringe upon this guaranty, as such delays or postponements frequently result from the request of the accused or from causes beyond the control of the enforcement officials. However, we believe it to be the duty of the prosecuting attorney as a matter of common justice to proceed as promptly as possible with all preliminary proceedings looking toward the trial of an accused and to the actual trial itself. We cannot lay down a hard and fast rule saying that delay in itself constitutes an infringement of the constitutional guaranty, but feel that each case must be viewed in the facts attendant thereupon, and an undue delay would no doubt be considered by the court as such an infringement.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

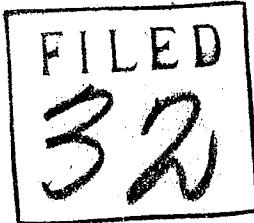
Very truly yours,

John M. Dalton
Attorney General

WFB/vtl

CONSERVATION COMMISSION:
WILDLIFE:

Conservation commission is authorized
to require permit from dealers selling
fish lawfully acquired in foreign state.



May 28, 1954

Honorable William J. Geekie
Prosecuting Attorney
City of St. Louis
Municipal Courts Building
14th and Market Streets
St. Louis, Missouri

Attention: Jasper R. Vettori,
Associate Prosecuting Attorney

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"It has been called to our attention
that a number of individuals are en-
gaged in the sale of fish consisting
of Carp and Buffalo without being li-
censed by the Missouri Conservation
Commission. It is contended no such
permit is required because the fish are
acquired in the State of Illinois.

"These persons are licensed by the City
of St. Louis as Hawkers and in the main
sell the fish from trucks. The fish are
purchased at Grafton, Illinois and trans-
ported here.

"Article 4, Section 40 (A) of the Missouri
Constitution gives to the Conservation
Commission the power to control, manage,

Honorable William J. Geekie

restore, conserve and regulate fish, etc. and Wildlife Resources of the State. The rules and regulations of the Commission for 1954, page 33, section (J) and section 51, page 46, require the vendors of fish have a permit from the Conservation Commission.

"Because the fish in question are acquired in the State of Illinois as evidenced by bills of sale in the possession of the vendors as required by section (J) previously referred to, it is the contention of these persons that the Commission is exceeding its jurisdiction in attempting to regulate and control the sale of such fish in this State.

"We would appreciate the benefit of an opinion from your office concerning this question." (Emphasis theirs.)

Article 4, Section 40 (a) of the Constitution of Missouri, reads in part as follows:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission consisting of four members appointed by the governor, not more than two of whom shall be of the same political party. * * *

As pertinent to the subject matter of the present inquiry we also direct your attention to Section 45 of the same article of the Constitution which reads as follows:

Honorable William J. Geekie

"The rules and regulations of the commission not relating to its organization and internal management shall become effective not less than ten days after being filed with the Secretary of State as provided in section 16 of this article, and such final rules and regulations affecting private rights as are judicial or quasijudicial in nature shall be subject to the judicial review provided in section 22 of article V."

The rules which have been promulgated by the conservation commission and which you have referred to in your letter of inquiry read as follows:

Section 45, Sub-Section (J),

"(J) Resident state retail vendor's permit \$2.00.--To possess, transport, buy and sell, exclusively for retail purposes, rabbits, the carcasses of furbearing animals, and only such frogs and fish, except minnows, as are permitted to be sold by this code and which have been legally obtained and supported by a bill of sale, upon the payment of a resident retail vendor's permit fee of two dollars (\$2.00)."

Section 51,

"Sec. 51. Commercial fish: turtles: limits, sale.--Commercial fish and turtles taken exclusively from the Missouri River, the Mississippi River, or that part of the St. Francis River which forms a boundary between the States of Missouri and Arkansas by the holder of the prescribed commercial fishing permit may be possessed, transported and sold in any numbers by the holder of such permit; provided, however, that channel catfish (*Ictalurus*), all species, taken from the aforesaid waters of this state, shall for the purpose of

Honorable William J. Geekie

this section retain the head and tail and be not less than fifteen (15) inches in length. Commercial fish taken from the aforementioned waters, or legally obtained from without the state, may be possessed, transported and sold by the holder of a wholesale fish dealer's or retail vendor's permit in any numbers during the prescribed open season. The holder of a wholesale fish dealer's or retail vendor's permit shall conduct such business exclusively at the location specified in the permit; provided, however, that the holder of a retail vendor's permit may sell only cooked fish at locations other than that specified in the permit. The holder of a wholesale fish dealer's permit may sell, transport, ship, distribute and deliver such fish to an authorized retail vendor, or other wholesale fish dealer, and authorized retail vendors may transport, sell and deliver same exclusively to consumers." (Emphasis ours.)

We pass over any violation of law which might arise from persons selling from trucks at more than one location, which might be inferred from the phraseology of your request, inasmuch as the rule quoted requires that such sales be made at only one location. It is apparent that the effect of the regulations quoted have the effect of requiring retail vendors of fish to obtain the permit provided for therein even though such fish have been lawfully acquired from sources outside the state of Missouri.

The question that then presents itself is the authority of the conservation commission to promulgate such a regulation. In this regard we direct your attention to Section 252.030, RSMo 1949, reading as follows:

"The ownership of and title to all wild life of and within the state, whether resident, migratory or imported,

Honorable William J. Geekie

dead or alive, are hereby declared to be in the state of Missouri. Any person who fails to comply with or who violates this law or any such rules and regulations shall not acquire or enforce any title, ownership or possessory right in any such wild life; and any person who pursues, takes, kills, possesses or disposes of any such wild life or attempts to do so, shall be deemed to consent that the title of said wild life shall be and remain in the state of Missouri, for the purpose of control, management, restoration, conservation and regulation thereof." (Emphasis ours.)

Also Section 252.040, RSMo 1949, reading as follows:

"No wild life shall be pursued, taken, killed, possessed or disposed of except in the manner, to the extent and at the time or times permitted by such rules and regulations; and any pursuit, taking, killing, possession or disposition thereof, except as permitted by such rules and regulations, are hereby prohibited. Any person violating this section shall be guilty of a misdemeanor." (Emphasis ours.)

Also to the provisions of Section 252.190, RSMo 1949, reading as follows:

"Any person who shall have in his possession or under his control any wild life, except in the manner, to the extent and at the time or times permitted by the provisions of this chapter and the rules and regulations of the commission, shall be deemed guilty of a misdemeanor; and any agent of the commission, and any sheriff or marshal or deputy thereof is hereby permitted and authorized to take and confiscate any such wild life from any person so possessing or controlling the same." (Emphasis ours.)

Honorable William J. Geekie

Certain definitions appearing in Section 252.020, RSMo 1949, are pertinent to the subject matter of your inquiry and we quote therefrom:

"As used in this chapter, unless the context otherwise requires:

"(1) The word 'commission' shall mean and include the conservation commission as established by the Constitution of Missouri; and the words 'rules and regulations' shall mean those made by said commission pursuant thereto;

* * *

"(3) The words 'wild life' shall mean and include all wild birds, mammals, fish and other aquatic and amphibious forms, and all other wild animals, regardless of classification, whether resident, migratory or imported, protected or unprotected, dead or alive; and shall extend to and include any and every part of any individual species of wild life." (Emphasis ours and theirs.)

Under the statutory enactments quoted it is readily apparent that the state of Missouri has sought to extend its ownership or control of wildlife not only to that found or reduced to possession within this state, but also to that which may be imported hereto. It is fundamental that statutory enactments of the General Assembly are entitled to the presumption of validity and that absent a clearly unconstitutional or otherwise improper exercise of the general plenary power granted to such body, they will be upheld.

As a matter of fact Section 252.040, RSMo 1949, as it appeared in prior revisions in substantially the same form as now, has been held to be not invalid as a law impairing the obligation of contracts, as not being invalid by virtue of being retrospective in operation, and as not being invalid in authorizing the taking of private property for public use without just compensation. See State v. Heger, 93 S. W.

Honorable William J. Geekie

252, 194 Mo. 707, 1.c. 716. In that case the right of the state to prohibit the sale of game whether taken lawfully or unlawfully within or without the state was upheld. See quote from the case mentioned:

"This prosecution is under section 18 of the game law, which provides that: 'Any person, firm or corporation who shall at any time of the year barter, sell or offer for sale, in this State, either under the name used in this section or under any other name or guise whatever, any of the birds, game or fish protected in this act, whether taken within or without this State, or lawfully or unlawfully taken, shall be punished by a fine of not less than \$50 nor more than \$100 and cost of prosecution, and an additional fine of \$5 for every bird, fish, animal or part of every bird, fish or animal sold or offered for sale.'

"That this section of the act is not in conflict with any provision of either the State or Federal Constitution is clearly shown by the authorities cited. Whether there is any other provision or section of this act invalid, because in conflict with the Constitution, we do not undertake to say, but even if there were, that would not affect the validity of said section 18.* * *"

CONCLUSION

In the premises we are of the opinion that the Conservation Commission of Missouri may lawfully require that persons engaged in the retail merchandising of fish be required to obtain a permit from such Commission even

Honorable William J. Geekie

though such fish may have been lawfully acquired from sources outside the state of Missouri.

In this opinion we have discussed only the laws and regulations applicable to retail merchandising, as we construe your letter of inquiry to relate solely to that phase of the matter.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB:vlw

INSURANCE: Sec. 379.350 RSMo 1949 prohibiting rebating is
BROKERS: applicable to insurance brokers licensed under
Sec. 375.270 RSMo 1949, and penalty provisions
of Sec. 379.410 RSMo 1949 are applicable.



December 31, 1954

Honorable Edward W. Garnholz
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Mr. Garnholz:

This formal opinion is in reply to your original request which posed the two following questions:

(a) "Do Sections 379.350 and 379.410 Missouri Revised Statutes (1949) operate to prohibit an individual insurance broker (not a corporation), duly licensed pursuant to Section 375.270 Missouri Revised Statutes (1949), from sharing his commissions with the customer whom he represents and for whom he obtains insurance?"

(b) "Does an individual insurance broker (not a corporation) so acting fall within the purview of the penalty provisions of Section 379.410 Missouri Revised Statutes (1949)?"

Subsequent to the date of your original request for this opinion you submitted additional facts bearing on your fact situation, and we quote such facts as found in your letter of October 15, 1954:

"In reply to your letter of October 7, 1954, requesting further information in order to enable you to fully reply to my inquiry of September 28, 1954, the following facts are put forth for your consideration.

Honorable Edward W. Garnholz

"The insurance broker operates under an oral contract whereby his customer states to him that he is willing to pay a certain amount for the type of insurance requested by him. The broker thereupon goes to various general insurance agencies and places the insurance. The general insurance agency then bills the broker for the net premium and any and all amounts collected in excess of that amount the broker retains as his commission.

"To hypothesize an example:

"A customer requests the broker to cover him with automobile insurance and then asks what the premium is. The broker tells him '\$200.00', whereupon the customer, claiming to be able to obtain the same coverage for a lesser amount, informs the broker that he will pay only the amount of \$180.00 and that the broker is authorized to cover him based upon that agreement. The insurance broker thereupon places the insurance through a general insurance agency which said agency bills the broker only the amount of \$150.00, representing the net cost of the insurance. According to the general insurance agency, the broker is authorized to collect up to the \$200.00, but in pursuance to this oral contract with his customer, the broker collects the sum of only \$180.00.

"The question which is posed pursuant to my letter of September 28, 1954, concerns that \$20.00 differential representing the amount the broker could have collected had he not shared that with the customer whom he represents. * * *

Section 375.270 RSMo 1949, on its face, seems to contain a definition of the term "insurance broker", and the full section is quoted as follows:

"1. Whoever, for compensation, acts or aids in any manner in negotiating contracts of insurance or reinsurance, or placing risks or effecting insurance or reinsurance for any person other than himself, and not being

Honorable Edward W. Garnholz

the appointed agent or officer of the company in which such insurance or re-insurance is effected, shall be deemed an insurance broker, and no person shall act as such insurance broker, save as provided in this section.

"2. The superintendent of insurance may, upon the payment of a fee of ten dollars, issue to any person a certificate of authority to act as an insurance broker to negotiate contracts of insurance or re-insurance, or place risks, or effecting insurance or reinsurance with any qualified domestic insurance company or its agents, and with the authorized agents in this state of any foreign insurance company duly admitted to do business in this state.

"3. Such certificate shall remain in force one year, unless revoked by the superintendent of insurance for cause.

"4. Any person who shall act as broker or agent, in negotiating insurance or reinsurance, as above stated, without first having obtained a certificate of authority or broker's license for such purpose, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than ten nor more than one hundred dollars for each offense, to be recovered and applied in the manner prescribed in section 375.310."

Subparagraph 1 of Section 375.270 RSMo 1949, quoted above, was construed in *Farber v. American Automobile Insurance Company*, 177 S.W. 675, 191 Mo. App. 307, l.c. 321, and the Court referred to the language contained in subparagraph 1 of such statute in the following language:

"But this is a mere general declaration of the law as to the function of an insurance broker, and does not render him, in every transaction, the agent of the insured, for the facts attending the negotiations determine for whom he is acting. Notwithstanding the

Honorable Edward W. Garnholz

statute, a broker may become the agent of the insurer because of some special condition or circumstance attending the particular case."

Having disposed of Section 375.270 RSMo 1949 as a statute of rigid definition when applied to the term "insurance broker", we next look to subparagraph 2 of the statute to determine the scope of authority of the superintendent of the division of insurance when he refuses to issue or seeks to revoke a broker's license. Treatment of this subject is prefaced by stating that Departmental Order No. 40, dated December 15, 1951, issued by the Superintendent of the Division of Insurance of Missouri, and addressed to "all agents and brokers" sets forth grounds for revoking, or refusing to issue, licenses to agents and brokers. Such departmental order specifically mentions "(7) Rebating", and "(8) Misrepresentation" as grounds for revoking or refusing to issue an agent's or broker's license.

In the case of State ex rel. Mackey v. Hyde, 286 S.W. 363, 315 Mo. 681, the Supreme Court of Missouri had under review Section 375.270 RSMo 1949, cited above. At 315 Mo. 681, l.c. 691, 692, the Court spoke as follows concerning an insurance broker:

"There is one individual engaged in effecting insurance, however, who is neither an insurer nor the appointed agent of an insurer, and whose activities are by no means an open book. This individual is the insurance broker, and unless he were somehow brought within the scheme of regulation it would not be complete. * * * If brokers' licenses may be made use of to defeat the non-discriminatory provisions of the rate statute, as stands admitted on the pleadings, then in order that those provisions may not become a dead letter it is necessary that some discretion be exercised in the issuance of such licenses."

Rebates and special rates are specifically forbidden by Section 379.350 RSMo 1949, in the following language:

"No company or other insurer or agents shall directly or indirectly, by any special rate, tariff, drawback, rebate, concession, device or subterfuge, charge, demand, collect or receive from any person, persons or corporation any compensation and premium different

Honorable Edward W. Garnholz

from the rate or premium properly applicable to the property so rated, as indicated by its public rating record, and no company or other insurer shall discriminate unfairly between risks of essentially the same hazard and substantially the same degree of protection."

The word "agents" used in Section 379.350 supra, must be presumed to refer to agents of the insurer rather than to "brokers", since the statute deals with acts touching the charging and collection of premiums which represent the cost of insurance to the insured, and in *Farber v. American Automobile Insurance Co.*, supra, the Court spoke as follows at 191 Mo. App. 1.c. 324:

"This court has heretofore declared that a mere insurance broker, as such, is without authority to receive a premium from an applicant for insurance."

The premium charged for a policy of fire insurance reflects the cost of coverage to the insured as shown by the company's public rating record, and if a broker undertakes to change such cost of insurance to the insured by accepting a premium less than called for by the company's public rating record, he certainly effects a discrimination between the person with whom he is dealing and other insureds who must pay the premium established by the public rating record. At the same time such broker has actually misrepresented to the insured the true cost of the insurance. These acts on the part of the broker, together with any acts of his in connection with collecting the premium and remitting the same to the company through an authorized agency of the company remove him from his status of agent solely for the insured in placing the insurance, and he becomes an agent for the company taking the risk or its authorized agent who ratifies his acts.

In view of the considerations outlined above, as applied to the facts you have submitted it must be reasonably concluded that a broker sharing his commission, received from the authorized agency, with the insured in order to lessen the cost of the insurance as reflected in the company's public rating record is to be comprehended within the term "agents" as used in Section 379.350 RSMo 1949, which statute prohibits rebating. Having so concluded, it necessarily follows that the general penalty statute, Section 379.410 RSMo 1949, will apply to such broker.

Honorable Edward W. Garnholz

CONCLUSION

It is the opinion of this office that Section 379.350 RSMo 1949, prohibiting rebating is applicable to an insurance broker licensed under Section 375.270 RSMo 1949, and such broker comes within the purview of the penalty provisions of Section 379.410 RSMo 1949.

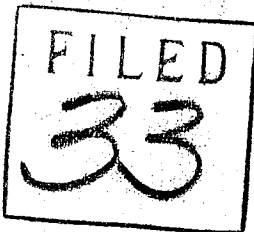
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO'M:vlw

BANKS: Bank or other institution having
TRUST COMPANIES: deposits or other assets in joint
SAFE DEPOSIT COMPANIES: names of deceased person and another
WAIVERS: must give ten day's notice of inten-
INHERITANCE TAXES: tion to transfer; transfer must have
consent of Director of Revenue and
Attorney General unless institution retains amount for taxes.
Same rule applies to contents of safety deposit boxes; not
applicable when estate not subject to inheritance taxes.



March 17, 1954

Mr. C. L. Gillilan
Assistant Supervisor
Division of Collection
Inheritance Tax
Department of Revenue
Jefferson City, Missouri

Dear Mr. Gillilan:

We render, herewith, our opinion based upon your
request of October 9, 1953, which request reads as follows:

"There is often presented to this Department a request for a ruling relative to the duties, responsibility and liability of banks, building and loan associations, brokerage firms and other depositories carrying accounts in the name of an individual, a partnership or joint account; also safe deposit companies and banks that have in their possession and under their control, in safe deposit boxes or otherwise, assets belonging to a deceased owner or standing in the name of a deceased owner and others as joint tenants with survivorship rights, or contained in safe deposit boxes rented to decedent and others under a co-tenant agreement.

"We have in our file a copy of an opinion addressed to Ryland, Stinson, Mag & Thomson, Attorneys, First National Bank Bldg., Kansas City, Missouri, dated October 27, 1933, and signed by John W. Hoffman, Jr.,

Mr. C. L. Gillilan

Ass't. Attorney General, relative to this matter, but that opinion does not clearly set forth the duties of depositories in connection with the transfer of joint accounts to survivors, particularly as to whether or not the bank, building and loan association or other depository should first obtain consent of the Director of Revenue and Attorney General. The larger city banks and building and loan associations now require consent from the Director of Revenue and Attorney General before transferring joint accounts to survivor, but the small town banks do not. Therefore, we respectfully request a review of this matter and an official opinion relative to the legal application of the provisions of Section 145.210, especially as to whether or not a depository of any character may transfer to survivor balance in joint accounts without first obtaining consent of the Director of Revenue and Attorney General; also as to whether or not banks, safe deposit companies or an individual may deliver to survivor contents of safe deposit boxes, or assets otherwise held, without first obtaining consent of the Director of Revenue and Attorney General.

"Also we will appreciate an opinion as to whether or not the provisions of subdivision 2 of Section 145.150 applies only to assets listed in Probate Court inventory or can such a Probate Court Order cover jointly held assets not so listed?

"We will appreciate your opinion at an early date."

We will first consider the question whether a bank, having on deposit, an account in form payable to either of two named persons or the survivor of them, can, upon the death of one, pay the account to the other without the consent of the Director of Revenue and the Attorney General.

Our answer, based on the provisions of Section 145.210, RSMo 1949, is a qualified "yes". Subsection 2 of said statute reads as follows:

Mr. C. L. Gillilan

"2. No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who is a resident or nonresident, or belonging to or standing in the joint names of such a decedent and one or more persons, including the shares of capital stock or other interest in a safe deposit company, trust company, corporation, bank or other institution making a delivery or transfer herein provided, shall deliver or transfer the same to the executor, administrator, or legal representative of said decedent or the survivor or survivors when in the joint name of a decedent and one or more persons or upon their order or request unless notice of the time and place of such intended delivery or transfer be served upon the director of revenue and attorney general at least ten days prior to said delivery or transfer; nor shall any safe deposit company, trust company, corporation, bank or other institution, person or persons, deliver or transfer any securities, deposits, or other assets belonging to or standing in the name of decedent or belonging to or standing in the joint names of decedent and one or more persons, including the shares of capital stock of or any other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer without retaining a sufficient portion or amount thereof to pay any tax or interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits, or other assets, including the shares of capital stock or other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer under the provisions of this chapter unless the director of revenue and the attorney general consent thereto in writing."

This statute requires, before paying of the account to the survivor, that ten day's notice of such intention to transfer be given to the Director of Revenue and the Attorney General. Consent of those two officials to such delivery or transfer is not required.

Mr. C. L. Gillilan

Upon such transfer, however, the bank is required to retain from the account a sufficient amount to pay "any tax or interest which may thereafter be assessed on account of the delivery or transfer of such securities; deposits or other assets * *," unless the Director of Revenue and the Attorney General, in writing, consent to such transfer. Such consent having been obtained, there appears to be no requirement that the bank retain any portion of the account.

So it comes to this: Transfer without such consent and without retaining a sufficient amount to pay the taxes or interest which may thereafter be assessed (under the provisions of Chapter 145, RSMo 1949) renders the bank personally liable to the payment of such taxes and interest and in addition, a penalty of \$1,000.00. By retaining a sufficient amount to pay such taxes or interest, the bank may make the transfer without any consent. In any case, it must have given the Attorney General and the Director of Revenue ten day's notice of its intention to make the transfer or delivery.

The question may be raised whether the ordinary checking or savings account with a bank constitutes a "deposit" within the meaning of this statute. While in common parlance, such an account is "money on deposit," it is not strictly so. Title to the money deposited passes to the bank; the depositor has a claim against the bank for that amount of money. The debtor-creditor relationship exists between bank and depositor.

We think, however, that the word "deposit" as used here includes such accounts. If it did not, the use of the word would add nothing whatever to the meaning of the statute; it would be included in the terms "securities * * * or other assets"; conversely, the word "deposits" would include "securities and other assets" in the possession or under the control of the safe deposit company, trust company, corporation, bank or other institution, person or persons.

If such account could not be said to be in the "possession" of the bank, it is certainly under "control" of the bank, since it requires affirmative action on the part of the bank to pay drafts and checks drawn against such account.

For the meaning of the statute, too, we may consider the purpose of the statute as gathered from the statute in its entirety, i.e., to prevent loss of inheritance taxes on property which passes by right of survivorship and not by will or intestate laws and is not included on the probate court inventory. The interpretation we have adopted serves that purpose.

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Your request extends to building and loan associations, brokerage firms, and other depositories having accounts, securities and other assets belonging to or standing in the name of a deceased person or in the joint names of deceased and another or others - whether they are within the terms of Section 145.210, supra. The statute applies to any "safe deposit company, trust company, corporation, bank or other institution, person or persons" having in possession or under control securities, deposits or other assets belonging to or standing in the joint names of a decedent and one or more persons. Safe deposit companies, then, come specifically within its terms; building and loan associations would come within the term "corporation" or "other institution"; and brokerage firms within the term "corporation" or, if unincorporated, "person or persons". The statute, therefore, applies to each of the institutions you have mentioned in your request and the rule stated above as to banks is applicable also to them.

You have asked specifically whether the contents of safety deposit boxes which have been leased to the decedent and another person as co-tenants, come within Section 145.210, supra. The language of the statute as to the assets covered is this:
" * * * securities, deposits and other assets * * * belonging and standing in the joint names of such a decedent and one or more persons * * *."

The contents of safety deposit boxes so rented are not necessarily subject to this provision simply because of the co-tenancy agreement under which the boxes are leased. Should the box contain only cancelled checks, love letters and property or assets belonging and standing only in the name of the survivor, then the bank or safe deposit company could not refuse, on the grounds of the provisions of this statute, to refuse to deliver to the survivor the contents thereof, nor would the bank or safe deposit company be required to give any notice to the Attorney General or Director of Revenue or retain any part of the contents of the box. On the other hand, should the box contain bonds or other property standing in the name of decedent or in the names of the decedent and another, such contents would come within the terms of this statute. It is the title to the contents of the box that counts and not the nature of the agreement under which the box is leased. Co-tenancy of safe deposit box does not establish co-tenancy of contents. Ann.-Lease-Joint Tenancy, 113 A.L.R. 575.

It remains to determine whether the contents of a safety deposit box comes within the terms of the statute at all. Notice that it applies to a safe deposit company, etc., "having

Mr. C. L. Gillilan

in possession or under control" securities, deposits or other assets covered by the statute. Does a safe deposit company have in possession or under control the contents of a safe deposit box within the contemplation of this statute?

Notice too, the statute prohibits the "delivery or transfer" of the assets except under the conditions set forth in the statute. When the lessee of a safety deposit box abstracts property therefrom, is the bank or safe deposit company "delivering" or "transferring" the property to him within the meaning of this statute?

We think the contents of a safety deposit box, such contents belonging to or standing in the name of a deceased person or in the joint names of a deceased person and another or others, come within this statute.

We arrive at that conclusion by this avenue: the relationship between lessor and lessee of a safety deposit box as to the contents of the box is that of bailee and bailor. *Kramer v. Grand National Bank of St. Louis*, (Mo. Sup.) 81 S. W. (2d) 961. In that case the court said at l.c. 967:

" * * * It is well settled by authority that where a bank, or safe deposit company, leases a safety deposit box or safe, and the lessee takes possession of the box or safe and places therein his securities or other valuables, the relation of bailee and bailor is created between the parties to the transaction as to the property so deposited. * * *"

Bailment implies possession; therefore, the lessor of a safety deposit box has its contents in possession.

Allowing the lessee to remove the contents of the box constitutes a constructive delivery of such contents from lessor to lessee within the meaning of this section. The lessor not only permits, but actually participates in the change of possession from lessor to lessee. See 11 Words and Phrases, Deliver; Delivery, page 654, et seq.

The conclusion that the contents of safety deposit box come within the terms of the statute is buttressed by the view that "safe deposit companies," whose primary or only business will be the renting of safe deposit boxes, are expressly named in the statute.

Mr. C. L. Gillilan

You have asked whether subsection 2 of Section 145.150 applies only to assets listed in the Probate Court inventory, or if the order provided therein cover assets held jointly by deceased and another or others, and not listed in the inventory?

Said subsection reads thus:

"2. Such court or the judge thereof in vacation shall immediately upon the filing of the inventory and appraisement of the estate of a decedent, examine the same, and if it is apparent, in the opinion of the said court or judge, that such estate is not subject to the tax provided for in this law, such finding and opinion shall be entered of record in said court, and thereupon the provisions of section 145.210 shall become inoperative as to the holders of funds or other property thereof - and there shall be no further proceedings relating to such tax, unless upon the application of interested parties the existence of other property or an erroneous appraisement be shown."

This makes it the duty of the court to examine the inventory filed, and, if it is apparent in the opinion of the court that the estate is not subject to the tax provided in Chapter 145, RSMo 1949, he enters his finding to that effect. Then the institutions and persons covered by Section 145.210, RSMo 1949, are no longer obligated to give any notice, obtain any consent, or withhold any assets under that statute, before transferring or delivering assets to the person or persons entitled thereto. The finding made by the court under this section is based solely upon his examination of the inventory filed in the court. Such a finding, according to the statute, does not, however, foreclose the showing to the court of the existence of other property or of erroneous appraisement, which would render the estate subject to tax.

CONCLUSION

It is the opinion of this office that:

1) A safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession

Mr. C. L. Gillilan

or under control securities, deposits or other assets standing in the joint names of a deceased person and another, must give the Attorney General and Director of Revenue ten day's notice of its intention to deliver or transfer such property to the survivor; that such delivery or transfer can then be made without consent of the Director of Revenue and the Attorney General, provided that a sufficient amount is retained to pay taxes or interest thereafter assessed. Such transfer or delivery can be made without such retention only with the consent of the Director of Revenue and Attorney General.

2) This applies also to the contents of safety deposit boxes which contents stand in the joint names of the decedent and another although it is the ownership of the assets contained in the box which is the important matter and not the agreement under which the safety deposit box is leased.

3) The finding of the court under Section 145.150, RSMo 1949, is based solely upon his examination of the inventory and appraisement filed. A finding that the estate is not subject to tax renders Section 145.210, RSMo 1949, inoperative.

The foregoing opinion, which I hereby approve, was prepared by my assistant, W. Don Kennedy.

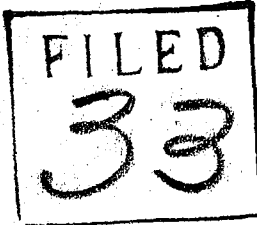
Very truly yours,

JOHN M. DALTON
Attorney General

WDK:hr,lw

HOSPITALS:
COUNTY HOSPITALS:
SOCIAL SECURITY:

Employer's contribution for county hospital employees for social security paid out of hospital tax money, or 5% of general revenue appropriated for hospital purposes by county court.



April 7, 1954

Honorable R. M. Gifford
Prosecuting Attorney
Sullivan County
Green City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this office, and reading as follows:

"The County Clerk of Sullivan County, Missouri, inquires of this office as to the position of the County Court with reference to a certain bill certified by the Board of Trustees of the Sullivan County Memorial Hospital, a county hospital operating under the statutes of this state and originally constructed in cooperation with certain agencies of the federal government. The bill in question is in the approximate amount of \$500.00 and represents one and one-half per cent of the salaries paid to the employees of the institution and is that amount required to be forwarded to the appropriate federal authority for social security purposes. The County Court questions their authority to pay this sum from their general revenue for the reason that no amount for such purpose was set up in 1953 in the county budget and further because they do not consider themselves to be employers for social security purposes and that the source from which such contribution should be made is that source from which the salaries themselves arise."

By a subsequent letter you further informed this office that all the revenue of Sullivan County for the year 1953 has already been expended.

Since you refer in your letter to a "board of trustees" we assume that the county hospital of Sullivan county, a county of the third class, was established under the provisions of Section 205.160 to Section 205.340 RSMo 1949.

Honorable R. M. Gifford

Sullivan County employees are covered by the provisions of the Federal Social Security Act under provisions of a contract making coverage effective January 1, 1951.

Section 205.200, L. Mo. 1951, p. 776, provides for the imposition of a tax for such a county hospital and for the establishment of a special county hospital fund therefrom.

Section 205.230 RSMo 1949, provides as follows:

"In counties exercising the rights conferred by sections 205.160 to 205.340, the county court may appropriate each year, in addition to tax for hospital fund herein provided for, not exceeding five per cent of its general fund for the improvement and maintenance of any public hospital so established."

The money to be expended for hospital purposes is limited then to the funds raised by the special hospital tax authorized by Section 205.200, supra, and by the 5% of general revenue, if the county court decides to appropriate such under the provisions of Section 205.230, supra.

We are enclosing an official opinion of this office rendered under date of April 16, 1952, to George Henry, which holds that the county's contribution for county health center employees should be paid from the county health center fund. We believe the same reasoning to be applicable in the present instance, and hold that the county's contribution for the county hospital employees' social security payments should be made from the special hospital fund derived from tax levied under Section 205.200, or from the 5% of general revenue authorized to be appropriated for the county hospital fund by Section 205.230, if the county court makes such appropriation.

You have not stated in your letters whether or not the county court has acted to make the appropriation authorized by Section 205.230. We are, therefore, unable at this time to determine just what money is or is not available for county hospital purposes.

We are enclosing an official opinion of this office rendered under date of July 10, 1946, to Davis Benning, relative to the question of what class of the county budget the contribution authorized by Section 205.230 is to come out of, if the county court wishes to make such appropriation.

Honorable R. M. Gifford

CONCLUSION

It is the opinion of this office that the county's contribution for social security payments on salaries of county hospital employees are to be paid out of the funds derived from the special county hospital tax authorized by Section 205.200, L. Mo. 1951, p. 776, or out of the 5% of general revenue authorized to be appropriated for the county hospital fund by the county court under provisions of Section 205.230 RSMo 1949, if the county court decides to make such appropriation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. C. B. Burns, Jr.

Very truly yours,

CBB/ld

JOHN M. DALTON
Attorney General

encl.

STATUTORY CONSTRUCTION:
RULE 29.01, SUPREME COURT RULES
OF CRIMINAL PROCEDURE:
SECTION 485.120 LAWS OF 1951:

Fee of official court reporter of
circuit court for transcripts made
by him from notes taken of court
proceedings had under provisions of
Rule 29.01, Supreme Court Rules of

Criminal Procedure, cannot be taxed as costs of the case. Only in
those circuit court cases which are contested, and those in which
the testimony is to be preserved shall the circuit clerk tax the
\$5.00 fee prescribed by Section 185.120 RSMo. 1949, as costs of the
case. When collected, the clerk shall pay said fee into the county
or city treasury.

FILED
34

January 21, 1954

*see letter of
Dec-8-54 J.M.D*

Honorable Arthur U. Goodman, Jr.
Judge of the Circuit Court
Twenty-Second Judicial Circuit
Kennett, Missouri

Dear Sir:

Your recent request for a legal opinion of this department
has been received and reads in part as follows:

"(1) When the Official Court Reporter reports
the evidence and files a transcript thereof, pursuant
to Rule No. 29.01 of the Supreme Court, should a fee
for the Reporter's transcript and/or services be taxed
as costs in the case? If so, is this amount, when
collected, to be paid to the Reporter or into the
county treasury?

"(2) Should the fee of \$5.00 mentioned in
Section 485.120 be taxed as costs in all cases heard
in Circuit Court? We are thinking particularly of
uncontested suits for divorce, on accounts, notes,
etc., where the evidence is taken down by the Report-
er."

The general rule prevailing in most jurisdictions with refer-
ence to whether or not a court reporter's or stenographer's fees
for preparing a transcript taken in any court procedure is that
such fees are not to be included in the costs of the case unless
specifically so provided by statute. Said general rule has been
given in Volume 20, C.J.S., p. 483, and reads as follows:

" * * * in general, in the absence of statute or of
some special agreement between the parties authorizing
it, stenographer's fees are not taxable as costs. How-
ever, stenographer's fees constitute an item proper to

Honorable Arthur U. Goodman, Jr.

include in the taxable costs under statutory provisions in force in various jurisdictions, and where it is authorized by consent or express agreement of the parties. When authorized by statute stenographer's fees can only be allowed in cases which the statute provides for; and under some statutes the right is limited to fees of official stenographers; and, under other statutes, to cases in which an answer is filed, tax suits excepted. Also, under various statutes fees for transcripts may be taxed as costs, subject in various jurisdictions to specified conditions and restrictions on the right, such as that they must be ordered by the court, and, it has been held, by the successful party, or used in subsequent proceedings in the cause. Ordinarily in the absence of statute, rule of court, custom equivalent to rule of court, order of court in a specific case, or special agreement between the parties, the cost of a transcript or copy of the evidence, or of a part thereof, obtained for the convenience of the parties or their counsel, cannot be taxed as part of the costs, even though ordered and used by the court."

In order to determine whether or not this rule applies in Missouri, requires an examination of various sections of the statutes regarding the duties of the court reporter, the fees allowed to him by law for services rendered, and whether or not such fees are to be included in the costs of the case, and if so, under what circumstances this may be done.

The first section of the statute to which we call your attention is Section 485.050, RSMo. 1949, setting up the duties of the official court reporter of the circuit court and reads as follows:

"It shall be the duty of the official court reporter so appointed to attend the sessions of the court, under the direction of the judge thereof; to take full stenographic notes of the oral evidence offered in every cause tried in said court, together with all objections to the admissibility of testimony, the rulings of the court thereon, and all exceptions taken to such rulings; to preserve all official notes taken in said court for future use or reference, and to furnish to any person or persons a transcript of all or any part of said

Honorable Arthur U. Goodman, Jr.

evidence or oral proceedings upon the payment to him of the fee herein provided."

The second section of the statute to which we direct your attention is Section 485.100, Laws of 1951, p. 449, which prescribes the amount of fees the court reporter shall receive for making a transcript from his notes taken in every cause in the circuit court, and under what circumstances such fees shall be taxed as court costs. Said section reads as follows:

"For all transcripts of testimony given or proceedings had in any Circuit Court, Court of Common Pleas or Court of Criminal Correction, the court reporter shall receive the sum of forty-five cents per twenty-five line page for the original of said transcript, and the sum of fifteen cents per twenty-five line page for each carbon copy thereof; said page to be approximately eight and one-half inches by eleven inches in size, with left-hand margin of approximately one and one-half inches and right-hand margin of approximately one-half inch; answer to follow question on same line when feasible; such page to be designated as a legal page. Any judge may, in his discretion, order a transcript of all or any part of the evidence or oral proceedings for his own use, and the court reporter's fees for making the same shall be taxed in the same manner as other costs in the case; Provided that in criminal cases where an appeal is taken or a writ of error obtained by the defendant, and it shall appear to the satisfaction of the court that the defendant is unable to pay the costs of such transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished and the court reporter's fees for making the same shall be taxed against the state or county as may be proper; and in such case the court reporter shall furnish two transcripts in duplication of the notes of the evidence, for one of which he shall receive the sum of 45 cents per legal page for the original, but shall receive no compensation for the other."

It is noted that only in two instances are the court reporter's fees for making a transcript to be taxed with other costs in the case under this section, namely: 1) when the judge orders a transcript of all or any part of the evidence or oral proceedings to

Honorable Arthur U. Goodman, Jr.

be made for his own use, and 2) when an appeal is taken or a writ of error is obtained by the defendant in a criminal case and it appears to the satisfaction of the court that the defendant is unable to pay the costs of the transcript, when the transcript is for the purpose of perfecting his appeal, the court shall order a transcript furnished and the court reporter's fees for making same shall be taxed against the state or county as may be proper.

Reference is made in the opinion request to Rule 29.01 of the Rules of Criminal Procedure adopted by the Supreme Court of Missouri, which Rule reads as follows:

"(a) In every criminal prosecution in any court of this state, the accused shall have the right to appear and defend the same in person and by counsel. If any person charged with the commission of a felony appears upon arraignment without counsel, it shall be the duty of the court to advise him of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel. If the defendant so requests, and if it appears that the defendant is unable to employ counsel, it shall be the duty of the court to appoint counsel to represent him. If, after being informed as to his rights, the defendant indicates his desire to proceed without the benefit of counsel, and the court finds that he has intelligently waived his right to have counsel, the court shall have no duty to appoint counsel unless it appears to the court that, because of the gravity of the offense charged and other circumstances affecting the defendant, the failure to appoint counsel may result in injustice to the defendant. Counsel so appointed shall be allowed a reasonable time in which to prepare the defense. They shall serve without compensation unless counsel so appointed shall be associated with a Public Defender Bureau or Committee which employs or retains lawyers whose services are available, without charge, to indigent persons accused of the commission of a crime, or unless provisions are made by public authority to compensate counsel.

"(b) In every case where the defendant in a felony case appears upon arraignment without counsel, the reporter of the court shall record accurately all proceedings taken by the court under the provision of this Rule, and, in

Honorable Arthur U. Goodman, Jr.

the event counsel is not appointed by the court, the court reporter shall prepare a transcript of such proceedings, shall certify to the correctness thereof, and such transcript shall be filed with the other papers in the case, but the failure of the court reporter to comply with the provisions hereof shall not be indicative that the court has failed to observe the requirements of this Rule."

We construe this Rule to mean that in every felony case in which the defendant is arraigned and is not represented by counsel, it is the duty of the court reporter to keep an accurate record of " * * * all proceedings taken by the court under the provisions of this Rule, and, in the event counsel is not appointed by the court, the court reporter shall prepare a transcript of such proceedings, shall certify to the correctness thereof, and such transcript shall be filed with the other papers in the case * * * ".

It is apparent that any or all proceedings taken by the court, which are to be shown in the transcript made by the court reporter, can relate only to those authorized under the Rule. The Rule relates solely to such matters as the defendant in a criminal case being present in court, his right to counsel, appointment of such counsel by the court, defendant's arraignment without counsel, and the duties of the court reporter in taking notes of the proceeding, preparing and certifying to the correctness of the transcript made by him from such notes, and the filing of same with the other papers of the case.

Upon a comparison of the provisions of the above quoted Rule with those of Section 485.100 supra., it is readily seen that the transcript referred to in the Rule is not the same or one of the same nature, nor is it made or filed for the same purpose as the transcript authorized under the provisions of Section 485.100 supra.

As already noted, the transcript prepared under authority of said Rule, is not a complete transcript of all the testimony or other oral proceedings had in a criminal case, but contains only that information required under the Rule. Apparently, it is for the purpose of preserving a record of the proceedings of the Court under the Rule, and must be made and filed in every criminal case (regardless of whether or not an appeal is taken or writ of error obtained by the defendant) in which the defendant is arraigned when not represented by counsel.

Honorable Arthur U. Goodman, Jr.

Section 485.100 supra., specifically states that in every criminal case when an appeal is taken or writ of error obtained and it appears that the defendant is unable to pay for the transcript, then the court shall order the transcript made by the court reporter, for the purpose of allowing the defendant to perfect his appeal, and that the fee for the reporter's services shall be taxed as other costs of the case, which shall finally be paid by the state or county.

Therefore, in view of the foregoing, our answer to the first inquiry of the opinion request is in the negative.

Your second inquiry is whether the fee mentioned in Section 485.120, Laws of 1951, p. 450, shall be taxed as costs in all cases heard in circuit court. Said section reads as follows:

"In every contested case, or case in which the evidence is to be preserved, except for the collection of delinquent or back taxes, in any circuit court or division thereof, when an official court reporter is appointed, the clerk of said court shall tax up the sum of five dollars, to be collected as other costs, and paid by said clerk into the county or city treasury, toward reimbursing the county or city for the compensation allowed such court reporter as herein provided."

Whether the answer to your inquiry shall be in the affirmative or in the negative will depend upon the construction given this section, and in this connection we wish to remind you that the cardinal rule of statutory construction in Missouri is that the statute under consideration must be construed in such a manner as to give effect to the legislative intent, and, if possible, such intention must be ascertained from the language used in the statute. This rule is so well established that we believe it is unnecessary to cite any cases upholding such rule, for to do so would unduly lengthen this opinion without any benefits resulting therefrom.

Keeping said cardinal rule of statutory construction in mind, we shall attempt to construe Section 485.120 supra. in accordance with what we believe to be the legislative intent. The pertinent parts of said section are:

"In every contested case, or case in which the evidence is to be preserved, except for the collection of delinquent or back taxes, in any circuit court or division thereof * * *

Honorable Arthur U. Goodman, Jr.

the clerk of said court shall tax up the sum of five dollars, to be collected as other costs and paid by said clerk into the county or city treasury * * *."

It is to be noted that the word "or" is used between the first two phrases of the section, and we believe that it is necessary to our discussion herein to determine whether it has been used disjunctively or conjunctively so that the proper meaning may be given to the parts of the sentence it connects. The word may be used either disjunctively or conjunctively but it is ordinarily used disjunctively. Regarding such use of the word, the following statements are found in Volume 67, C.J.S., p. 513:

"In its elementary sense, the word 'or' ordinarily, and in ordinary use and in its accurate and natural meaning, is a disjunctive particle, ordinarily used it means one or the other of two, but not both, as, you may read or write, that is, you may do one of two things at your pleasure, but not both; generally corresponding to 'either,' as 'either this or that,' or 'one or the other,' being frequently used with 'either' as a correlative. The word 'or' may be used to mark off and separate alternative ideas, and it may indicate one or the other of two or several persons, things, or situations, and not a combination of them."

Also in the case of Nordberg v. Montgomery, 351 Mo. 180 l.c. 186, the court said:

"The word 'or' is ordinarily used as a disjunctive to mean 'either' as 'either this or that.' Dodd v. Independence Stove & Furnace Co., 330 Mo. 662, 51 S.W. (2d) 114."

It appears that the legislative intent with reference to the use of the word "or" in Section 485.120 supra., was that the word should be used in the disjunctive rather than in the conjunctive, and was intended to separate the words which refer to separate and distinct classes of cases filed in circuit courts rather than only the one such class of cases. In other words, the reference is to: 1) every contested case, and 2) every case in which the evidence is to be preserved.

Not every case filed in circuit court cases is contested, and the testimony in every case filed in the circuit court is not required to be preserved, but only in those cases which are contested

Honorable Arthur U. Goodman, Jr.

and those in which the testimony must be preserved is it the duty of the circuit clerk to tax the five dollar fee as court costs under the statute.

Therefore, in answer to your second inquiry, it is our thought, that the five dollar fee mentioned in Section 485.100 supra., is not required to be taxed as costs in every case filed in circuit court, but that said fee shall be taxed as costs only in those cases which are contested, and those in which the testimony is required to be preserved.

CONCLUSION

It is the opinion of this department that the fee of the official court reporter of the circuit court for preparing a transcript from his notes of the proceedings had by said court under the provisions of Rule 29.01, Rules of Criminal Procedure as adopted by the Supreme Court of Missouri, cannot be taxed as costs of the case.

It is the further opinion of this department that only in those cases filed in the circuit court which are contested, and those cases in which the testimony is to be preserved shall the clerk of said court tax the five dollar fee prescribed by Section 485.100, Laws of 1951, p. 449, as costs of the case, and when collected, he shall pay same into the county or city treasury as provided by said section.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

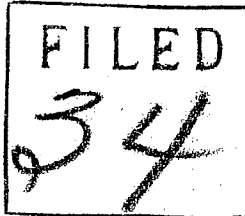
Very truly yours,

JOHN M. DALTON
Attorney General

PNC:sm

SAVINGS AND LOAN
ASSOCIATION:

Construction of Section 369.360 MoRS Cum. Supp.
1953, with respect to making loans in three
specific instances.



March 16, 1954

Mr. Morris G. Gordon, Supervisor
Savings and Loan Supervision
Department of Business & Administration
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion to construe Section 369.360 MoRS Cum. Supp. 1953, respecting the right of Savings and Loan Association to make loans in the following instances, where the purchaser has a sufficient equity to safeguard the loan and otherwise complies with the law and bylaws of the association:

- "1. Where an originally built brick flat with four entrances is transformed to eight efficiency apartments without changing the four entrances.
- "2. Where there is a motel or tourist court with ten cabins or motels in the yard, the owner having residence in one.
- "3. A farm of 90 acres with a one family 7 room residence."

Section 369.360 MoRS Cum. Supp. 1953, reads:

- "1. An association shall have power to make, buy and sell direct reduction periodical installment or term loans of any amount secured by first liens on real estate, subject to the following limitations: Each such loan shall be secured by home property, as herein defined, and shall not exceed twenty thousand dollars; provided, that an association may have invested an aggregate amount, not exceeding fifteen per

cent of the aggregate balances of all loans held by it, in loans exceeding twenty thousand dollars each secured by first liens on home properties and in loans secured by first liens on other real estate, but no such loan shall exceed one per cent of the assets of the association or twenty thousand dollars, whichever is the greater.

"2. 'Home property' shall mean real estate upon which there is located, or will be located pursuant to a home loan, a dwelling or dwellings for not more than four families; but such a property shall not lose its home status because of the use of it in part for business or farm purposes.

"3. No association, except with the consent of the supervisor, shall sell in any consecutive twelve months period, except by making a bulk sale of all or substantially all of its assets as provided elsewhere in this chapter, real estate loans the aggregate of the principal balances of which, as of the respective dates of sales, exceed twenty-five per cent of the aggregate balances of all real estate loans as of the beginning of such twelve months period, or shall make sale of any real estate loan for an amount less than the balance, including interest, owing thereon."

The foregoing statute vests authority in saving and loan associations to make a loan secured by home property as defined in said statute, when complying with other provisions of said statute as to the amount of loan, security, etc.

In order to construe said statute, we must first determine what constitutes a dwelling as used therein in order to determine if the buildings described in each hypothetical question are dwellings. There are statutory definitions of dwellings, namely, Section 560.015 and 065 RSMo 1949. However, such definitions apply to buildings wherein offenses are committed against property with respect to arson, and burglary and therefore, such definitions are hardly applicable for use in this instance.

It was held in *Sanders v. Dickson*, 89 SW 577, 582, 114 Mo. App. 229, that a dwelling is one of a multiple meanings; however, in its broadest sense, the word denotes a building used as a human abode, home, though a suite of rooms occupied by one man, may be a dwelling. Also in *Fox v. Sumerson*, 13 At. 2d, 1, 2, 338 Pa. 545, the court held that an apartment house is nonetheless a dwelling

house though occupied by a number of families. See also Barnett v. Vaughn Institution, 119 N.Y.S. 45, 46, 134 App. Div. 921, State v. Garity, 46 N.H. 61, 62. In Luedke v. Carlson, 41 NW 2d, 552, 1.c. 554, the court held that a dwelling house as defined in a city zoning ordinance "as a dwelling other than a hotel providing lodging for eight or more persons", including buildings of a motor court which had four rooms each with accommodations for eight persons in each building.

In view of the foregoing definitions, we believe that the flat, tourist camp and farm referred to in this request, all can be classified as a dwelling house, as that term is used in Section 369.360 supra.

A well established rule of statutory construction is that all provisions of the statute should be construed together and effect given to all if possible. Logan v. Matthews, 52 SW 2d 989, 330 Mo. 1213.

In Anderson et al. v. Metropolitan Building Company, 163 SW2d 1024, 1.c. 1030, the question arose as to covenants in a deed restricting property for residential purposes only, one restriction being "that said land should be occupied and used by said second party, its assigns, including all tenants for residence purposes only, and not otherwise." The property in question was, however, being operated not only as a residence but by a tenant as a rooming and boarding house. The court, in holding that said property was being operated as a business purpose and therefore violated said restrictions in the deed, said: (1.c. 1030)

"* * * We are here concerned in determining whether the use made of the property by the tenant, with the knowledge, acquiescence and consent of the owner, is for 'residence purposes only, and not otherwise.' The owner contends that the use made by the tenant is not a violation of the restrictions and seeks to enjoin interference by plaintiffs. The question is whether the use made of the property, the primary purpose of the occupation, violates the restriction. The restrictive covenant expressly deals with the occupation and use by the owner, including tenants. Defendant Harden is not occupying and using the property 'for residence purposes only, and not otherwise,' regardless of the use the roomers may be making of the property. Her use of the property is a business purpose, even though, as an incident to the carrying on of such business, she may reside on the pre-

mises. See *Pierce v. Harper*, 311 Mo. 301, 306, 278 S.W. 410, where it was held that a boarding house was not a private dwelling-house or home for the use or occupancy of one single family and that such use was in derogation of the restrictive covenants affecting the premises even though defendant and her family used the premises as a place of residence."

"We hold that the parties intended to provide for a high class exclusive residence district and to prohibit expressly the operation of a business upon the premises or the use of any part of said premises for a business purpose, and, therefore, that the operation of a boarding and rooming house, as conducted by defendant Harden was a clear violation of the restriction. * * * "

By the same token, we believe renting the efficiency apartments in the flat building is using said building in part for business purposes. Therefore, this would amount to no bar in obtaining a loan under said statute.

There can be no question that the farm property is eligible for a loan under the last mentioned exception in said statute providing, of course, other conditions in said statute are fully complied with in every respect. Furthermore, the motel or tourist court likewise can qualify for such loan when all other conditions of such statute are met.

CONCLUSION

Therefore, it is the opinion of this department that all three of the properties referred to in this request meet the requirements of home property as defined in Section 369.360 MoRS Cum. Supp. 1953, and if all other requirements of said statute are complied with, Savings and Loan Association may loan money on said properties.

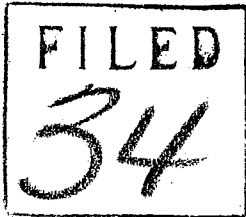
The foregoing opinion, which I hereby approve was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

ARR:sm

SAVINGS AND LOAN SUPERVISION: Savings and loan associations cannot invest their funds in such first mortgage building bonds to be used in constructing a building in Jefferson City, Missouri.



October 29, 1954

Mr. Morris G. Gordon, Supervisor
Savings and Loan Supervision
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads in part:

" * * * 'The Chamber of Commerce of Jefferson City is contemplating the erection of a building for the use of a new industry coming to the city, to be financed by an issue of \$200,000 in first mortgage building bonds to be sold to the business interests of the city.

" 'These bonds would bear interest at the rate of 4% annually to be paid out of rental received from the new industry which will lease the building for a period of ten years.

" 'The Savings and Loan Associations of the city are interested in the success of this venture. The influx of new families coming to the city because of the new industry would create a demand for additional housing and for the financing of such housing.

" 'We should like to have an opinion from you as to whether each association could purchase a part of this bond issue and still come within the provisions of Section 369-360-1 of the Missouri Savings and Loan Statutes.' "

Mr. Morris G. Gordon

Savings and loan associations are creatures of statute and receive authority to organize and operate thereunder by virtue of such statutes passed by the General Assembly and therefore, they have only such authority to make investments or loans as specifically provided by such statutes.

Sections 369.340 and 369.360, Missouri Revised Statutes Cumulative Supplement, 1953, are the particular statutes prescribing how such savings and loan associations may invest its funds and make real estate loans and read:

369.340. "1. Any association shall have power to invest its funds, without limit, in obligations of, or guaranteed as to principal and interest by, the United States of America or this state; obligations of federal home loan banks and of the federal savings and loan insurance corporation; accounts of any association doing business in Missouri, or which holds a valid certificate of insurance from the federal savings and loan insurance corporation.

"2. Any association shall have power, subject to limitations hereinafter stated, to invest its funds in bonds, notes or other evidences of indebtedness authorized by law and assumed, guaranteed or insured as to principal and interest by a state, city, county, drainage district, levee district, road district, school district, tax district, town, township, village or other civil administration, agency, authority, instrumentality or subdivision of a city, county or state; provided, however, that the amount of funds invested at any time in such bonds, notes or other evidences of indebtedness shall not exceed in the aggregate ten per cent of capital and that each such bond, note or other evidence of indebtedness shall, when purchased, meet any requirements as to quality which the supervisor may and is hereby empowered to prescribe biennially with the written approval of an advisory committee consisting of the governor, lieutenant governor and attorney general."

369.360. "1. An association shall have power to make, buy and sell direct reduction periodical installment or term loans

Mr. Morris G. Gordon

of any amount secured by first liens on real estate, subject to the following limitations: Each such loan shall be secured by home property, as herein defined, and shall not exceed twenty thousand dollars; provided, that an association may have invested an aggregate amount, not exceeding fifteen per cent of the aggregate balances of all loans held by it, in loans exceeding twenty thousand dollars each secured by first liens on home properties and in loans secured by first liens on other real estate, but no such loan shall exceed one per cent of the assets of the association or twenty thousand dollars, whichever is the greater."

Certainly this type of investment cannot come within the purview of Section 369.340, supra, unless possibly under that which provides that such associations may invest its funds in accounts of any association doing business in Missouri, or which holds a valid certificate of insurance from the Federal Savings and Loan Insurance Corporation. The word "association" has been defined under the act in Section 369.015, Subsection 1, RSMo 1949, and reads:

"When used in this chapter, the following words shall have the following meaning:

"(1) 'Association' shall mean a savings and loan association or savings association subject to the provisions of this chapter, including such an association now using the name 'building and loan association'; * * *."

In view of the foregoing definition of the word "association" as used in said chapter, we must conclude that such loans cannot be authorized thereunder.

We shall next consider the only other possible statute that might vest such authority to make this type of investment or loan, namely, Section 369.360, supra. This statute provides that such association shall have power to make, buy and sell direct periodical installments or term loans of any amount, under certain specific conditions. We believe that the provisions of Section 369.360, supra, are not applicable in this particular instance, that the proposal is not to make a loan as contemplated under Section 369.360, supra, but to invest

Mr. Morris G. Gordon

money in first mortgage building bonds and that is controlled by and under provisions of Section 369.340, supra.

It has already hereinabove been decided that said associations cannot purchase said first mortgage building bonds by virtue of Section 369.340, supra.

CONCLUSION

Therefore, it is the opinion of this department that said savings and loan associations cannot invest their funds in such first mortgage building bonds.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Yours very truly,

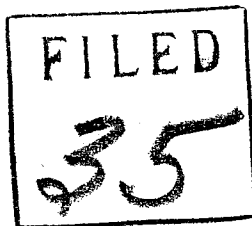
JOHN M. DALTON
Attorney General

ARH:vlw

ELECTIONS:
COUNTY COURTS:

County court of Greene County has exclusive jurisdiction to establish boundaries of election precincts for general, primary and special elections.

January 11, 1954



Honorable Douglas W. Greene
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading in part as follows:

"Since the City of Springfield has adopted a charter and established the City Manager form of government, the City Council has divided the various voting wards into precincts with certain of the wards having as many as seven precincts.

"The question has arisen as to whether the County Court or the City Council has the power to designate the polling places for the various wards, and I have been unable to find any statutory or case law which clarifies this problem.

* * *

"Our problem is to determine who has the final say-so as to the location of polling places in general, special or primary elections.

"We would appreciate any information that you could furnish us concerning this problem,

Honorable Douglas W. Greene

as arrangements have to be made many months in advance for the coming primary elections."

For some years after the formation of the State of Missouri all elections were conducted on the basis of the several municipal townships being the voting precincts. However, as the population of the state became greater it was necessary to provide for smaller voting units. Consequently, in 1845 an Act was passed dealing in a special way with the establishment of voting precincts. This Act has remained unchanged until this time, and now appears as Section 111.220, RSMo 1949. It reads as follows:

"Establishment and alteration of election districts or precincts.--The county courts of the several counties in this state shall have power to divide any township in their respective counties into two or more election districts, or to establish two or more election precincts in any township, and to alter such election districts and precincts, from time to time, as the convenience of the inhabitants may require."

For its historical interest Section 111.240, RSMo 1949, is quoted. This statute also formed a part of the Act of 1845 and has also remained unchanged until this time. It reads:

"Elections conducted in districts or precincts as in townships.--The place of holding the election shall be designated, and the judges and clerks of election appointed in such districts or for such election precincts, and the elections therein shall be conducted, in all respects, in the same manner as is herein provided by law for the townships." (Emphasis ours).

While not material to your particular inquiry, it is of some interest to note that after the General Assembly of Missouri had provided for the organization of counties on a township basis for the discharge of governmental affairs, similar provision was made with respect to the division of municipal townships into election precincts by the county courts of counties operating under the township form of government. This statute

Honorable Douglas W. Greene

first appeared in 1873 and now is found as Section 65.070, RSMo 1949. With the further passage of time and the development of large urban areas of population many of the functions which had previously been discharged by county courts with respect to the conduct of elections have been transferred to boards of election commissioners. In some of these areas the power to establish voting precincts has also been transferred to such boards, particularly in class one counties where we find Section 113.090, RSMo 1949, dealing with this subject, and Section 113.590, RSMo 1949, dealing with the same subject matter. However, it must be remembered that these are but minor exceptions to the general rule conferring such power upon the county courts in the respective counties, and have been designed to take care of the peculiar conditions arising in the urban centers to which they relate.

We have carefully examined the various statutes relating to the conduct of elections in cities of fifty to one hundred thousand inhabitants, in which category the City of Springfield falls, and while we find that adequate provision has been made for the establishment of voting precincts for the conduct of municipal elections; we fail to find that any deviation from the general rule with respect to general, primary and special elections has been effectuated. We note that Sections 75.060, 116.140 and 122.470, RSMo 1949, all deal with the conduct of municipal elections. With respect to these elections the council for the City of Springfield has undoubted authority to establish and alter as may be required such election precincts as may be proper and necessary to permit the free expression of the electorate upon questions of public policy submitted to them. However, at no place does it appear that the power to establish or alter such election precincts for general, primary and special elections has been divested from the county court.

CONCLUSION

In the premises we are of the opinion that the county court for Greene County has the power to establish and alter as may be necessary or convenient to insure a full and free expression of the electorate of that county, such election precincts as may be desired for all general, primary and special elections within and without the corporate limits of the City of Springfield; and to designate the polling places in such precincts.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

STATE PARK BOARD: The State Auditor is the only one authorized to prescribe the system of bookkeeping and accountancy for State Park Board. The State Park Board has no authority to contract with a firm of accountants to make an audit of the state parks.



January 11, 1954

State Park Board
1206 Jefferson Building
P. O. Box 176
Jefferson City, Missouri

Att: Mr. Abner Gwinn, Director

Dear Sir:

This will acknowledge receipt of your request for an opinion.

After quoting from the minutes of the meeting of the newly appointed State Park Board under date of December 4, 1953, to the effect that one member of said Board was authorized to confer with an accounting firm for recommendations for establishing a bookkeeping system of all State Park Board business and further directing the director to follow such recommendations and suggestions of both said accounting firm and the State Auditor, you request an opinion as to the authority of the State Park Board to make a separate audit of the State Parks.

Section 13, Article IV, Constitution of Missouri, provides that the State Auditor shall establish appropriate systems of accounting for all public officials of the state and post-audit the accounts of all state agencies, and reads:

"The state auditor shall have the same qualifications as the governor. He shall establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury at least once annually. He shall make all other audits and investigations required by law, and

State Park Board

shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds."

It is well established that a State Constitution is not a grant but a limitation of legislative power, so that the legislature may enact any law not expressly or inferentially prohibited by the Constitution of the State or Nation. *Hickey v. Board of Education of St. Louis*, 256 SW (2d) 775.

The General Assembly passed Section 29.180 V.A.M.S., requiring the State Auditor in cooperation with the Budget Director to establish systems of accounting for all offices and agencies of the State to conform with certain recognized principles of governmental accounting which shall also be uniform in application to offices of same grade and kind and to accounts of same kind, and further requires each department to keep such accounts in accordance with such systems prescribed by the State Auditor.

It is quite apparent from a reading of the foregoing constitutional and statutory provision that it was the intent of the framers of the Constitution and General Assembly that only the system of accountancy as prescribed by the State Auditor should be used by any public official of the State which will include the State Park Board.

The primary rule in construing statutes is to ascertain and give effect to legislative intent. *Laclede Gas Co. v. City of St. Louis*, 253 SW (2d) 832.

In view of Section 29.180 supra., providing that each department shall keep its respective accounts in accordance with the system of accounting prescribed by the State Auditor, also that the State Comptroller is required under the law to what might be termed pre-audit all accounts by certifying such accounts for payment, and certifying that such accounts are lawful obligations of the State and that there is sufficient appropriation for payment of same under and by virtue of Article IV, Section 28, Constitution of Missouri, Sections 33.030 and 040 V.A.M.S., that it was never the legislative intent that the State Park Board

State Park Board

should or could contract with a firm of accountants to audit the State Park Board.

You make two more inquiries in the last two paragraphs of your request. However, they are entirely too general and do not contain sufficient facts for us to render opinions thereon. If you have some particular question and will fully state the facts in each instance, we will gladly render an opinion; however we cannot assume too many facts in rendering official opinions.

CONCLUSION

Therefore, it is the opinion of this department that only the State Auditor is vested with authority to prescribe the proper system of accountancy for departments of State including the State Park Board. Furthermore, said State Park Board has no authority to contract with a firm of accountants to audit State Park Board.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

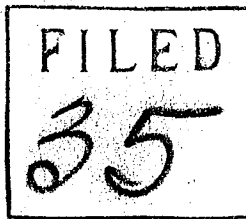
Yours very truly,

JOHN M. DALTON
Attorney General

ARH:sm

APPOINTMENT OF ATTORNEY:
preliminary hearing:

There is no obligation upon the part of a magistrate to appoint an attorney on behalf of an indigent defendant for a preliminary hearing on a felony charge.



April 19, 1954

Honorable Douglas W. Greene
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"The attorneys of this county have become very vexed at the interpretation of the Rules of Criminal Procedure as interpreted by the Judges of our Magistrate Courts here, relative to the appointment of attorneys for indigent criminal defendants.

"Our Magistrates take the position that attorneys are to be appointed by the Magistrate Judge at the time that the defendant's bond is set and prior to the preliminary hearing. The lawyers contend that this places a double burden on them in having to go through a preliminary as well as a circuit court trial, and that it also makes it necessary for them to be called on to act as counsel much more frequently than would normally be the practice.

"Supreme Court Rule 29.01 states, in part, that if any person charged with the commission of a felony appears upon arraignment without counsel, it shall be the duty of the court to advise him of his right to counsel and to appoint counsel for him, if he is unable to employ counsel. Rule 25.04 states that arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge, and calling on him to plead thereto. As a Magistrate cannot, under any circumstances, accept a plea to a

Honorable Douglas W. Greene

felony charge, it would seem to me that Rule 29.01 means that it shall be the duty of the Circuit Court, after the defendant is bound over, to appoint counsel for indigent defendants.

"I believe that my interpretation of these rules is correct, since sub-section (b) of Rule 29.01 indicates that where the defendant in a felony case appears at arraignment without counsel, a court reporter should record all proceedings, and there are no court reporters in Magistrate Court."

Supreme Court Rule 29.01 sets forth the time when, in a criminal proceeding, and the circumstances under which, the court will appoint an attorney to represent a person accused of crime. That rule reads:

"(a) In every criminal prosecution in any court of this State, the accused shall have the right to appear and defend the same in person and by counsel. If any person charged with the commission of a felony appears upon arraignment without counsel, it shall be the duty of the court to advise him of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel. If the defendant so requests, and if it appears that the defendant is unable to employ counsel, it shall be the duty of the court to appoint counsel to represent him. If, after being informed as to his rights, the defendant indicates his desire to proceed without the benefit of counsel, and the court finds that he has intelligently waived his right to have counsel, the court shall have no duty to appoint counsel unless it appears to the court that, because of the gravity of the offense charged and other circumstances affecting the defendant, the failure to appoint counsel may result in injustice to the defendant. Counsel so appointed shall be allowed a reasonable time in which to prepare the defense. They shall serve without compensation unless counsel so appointed shall be associated with a Public Defender Bureau or Committee which employs or

Honorable Douglas W. Greene

retains lawyers whose services are available, without charge, to indigent persons accused of the commission of a crime, or unless provisions are made by public authority to compensate counsel.

"(b) In every case where the defendant in a felony case appears upon arraignment without counsel, the reporter of the court shall record accurately all proceedings taken by the court under the provisions of this Rule, and, in the event counsel is not appointed by the court, the court reporter shall prepare a transcript of such proceedings, shall certify to the correctness thereof, and such transcript shall be filed with the other papers in the case, but the failure of the court reporter to comply with the provisions hereof shall not be indicative that the court has failed to observe the requirements of this Rule."

It will be noted that the court is not required to appoint an attorney, until the defendant is "arraigned". "Arraignment" is thus defined in Supreme Court Rule 25.04, which reads:

"Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. A defendant may plead not guilty or guilty. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or pleads equivocally, or if the court refuses to accept a plea of guilty, or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. If a defendant is tried as if he had been arraigned and entered a plea of not guilty, the failure of the record to show arraignment, and the entry of such plea shall not constitute reversible error."

It seems clear that "arraignment" is not the appearance before a magistrate for a preliminary examination, but the appearance after the defendant is bound over before the circuit court.

Honorable Douglas W. Greene

It will be noted by Supreme Court Rule 25.04, supra, that "arraignment" consists, first, of reading the indictment or information to the defendant.

Supreme Court Rule 23.02 states that "no information charging the commission of a felony shall be filed against a person unless the accused shall first have been afforded the right of a preliminary examination before a magistrate.* * *"

All of the above would seem to clearly indicate that there was no obligation on the part of a magistrate to appoint an attorney for an indigent defendant at a preliminary hearing. In this regard the Missouri Supreme Court, in the case of Skiba v. Kaiser, 178 S.W.(2) 373, at l.c. 374, stated:

"Petitioner first contends that the judgment and sentence of the trial court is illegal because he was not furnished an attorney at his preliminary hearing. We have recently ruled adversely to petitioner's contention in the case of Lambus v. Kaiser, Mo. Sup., 176 S.W. 2d 494, 497. In that case, we said, 'It has long been established by our decisions that a preliminary examination may be waived and is now so provided by statute. If the accused pleads and goes to trial without calling the court's attention to the State's failure to accord him such examination, he is held to waive it.' The record shows that the petitioner, by affirmative action, waived the preliminary examination. If he had had counsel at that time, the magistrate would have been required to send for him if requested. (See Section 3867, R.S.Mo.1939, Mo.R.S.A.) but there is no constitutional provision, statute, or decision in this State requiring the justice to appoint counsel for prisoner at a preliminary examination."

In the case of State v. Graves, 182 S.W.(2) 46, at l.c. 51 et seq., the court stated:

"The justice of the peace testified he did read the complaint to the appellant, and that appellant said he knew what a preliminary hearing was, and had had one before. He said it meant he would be taken to the circuit court and furnished with a lawyer; and if he didn't have any money to pay for it the court would pay for it. The justice further testified appellant was told he could have an attorney then and there if he wanted one. The

Honorable Douglas W. Greene

prosecuting attorney testified he handed the complaint to the appellant at the hearing and signed it in his presence; that the justice read it to him; and that the conversation with appellant occurred substantially as testified to by the justice of the peace.

"The only authority cited by appellant on this point is Sutorius v. Mayor, Div. 1, 350 Mo. 1235, 170 S.W. 2d 387, 398 (24), 171 S.W.2d 69, which announces the principle that a waiver is the voluntary relinquishment of a known existing legal right. In other words his contention is based on the theory that he did not know his rights. We think the trial court's ruling can and should be sustained on the ground that the evidence shows appellant did know his rights and what he was doing. But it is further to be remembered that a preliminary hearing under Sec's. 3857, 3873, does not put the accused on trial for the commission of the offense charged; but merely inquires whether there is probable cause for believing a felony has been committed and that the accused is guilty thereof - this for the purpose of binding him over for trial or committing him to jail in event he fails to give sufficient bail, if the required facts are found and the offense is bailable. In other words, the statutes are merely in aid of the arrest and detention of the accused, not of his conviction. This court en banc has recently held that our Constitution and statutes do not require the justice of the peace to appoint counsel for the accused at such hearings. Skiba v. Kaiser, Mo. Sup., 178 S.W.2d 373, 374 (2). This assignment is overruled."

CONCLUSION.

It is the opinion of this department that there is no obligation upon the part of a magistrate to appoint an attorney on behalf of an indigent defendant for a preliminary hearing on a felony charge.

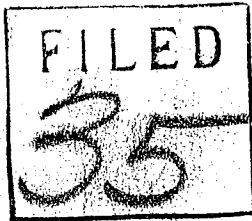
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

STATE PARKS: No law exists to prohibit the sale of merchandise with the name of a state park inscribed thereon.



May 14, 1954

Honorable Abner Gwinn
Director, Missouri State Park
Board
1206 Jefferson Building
Jefferson City, Missouri

Dear Mr. Gwinn:

Reference is made to your request for an official opinion of this office which request reads as follows:

"Our Superintendent at Roaring River State Park has inquired for the Concessionaire, Mr. Malcolm Waggoner, whether or not souvenir stand operators outside of the Roaring River State Park have the legal right to sell merchandise such as scarfs, ashtrays, pictures, etc., with the name, Roaring River State Park, inscribed on them.

"There are many souvenir stands surrounding our state parks and I am sure that they sell post cards and other items so inscribed. However, the question has never been raised before this time and I would appreciate your official opinion regarding this as soon as possible."

We have examined the statutes relating to state parks and other applicable provisions and find no provisions which would prohibit a person from selling souvenirs such as scarfs, ashtrays, pictures, etc., with the name of a state park inscribed thereon.

We further know of no principle or rule of law which would prohibit such sale and, therefore, are of the opinion that a person may sell such merchandise with the name of the state park inscribed thereon.

Hon. Abner Gwinn

CONCLUSION

Therefore, it is the opinion of this office that there is no legal prohibition against a person selling or offering for sale goods and merchandise with the name of a state park inscribed thereon, notwithstanding the fact that such sales are made without the territorial limits of said park.

This opinion which I hereby approve, was written by my assistant, Mr. Donal D. Guffey.

Yours very truly,

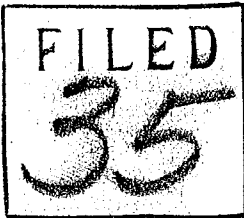
JOHN M. DALTON
Attorney General

DDG:mnw

ITINERANT VENDORS:
AUCTIONEERS:

An itinerant vendor within the meaning of Section 150.380 et seq. who is selling his wares at public auction and is actually crying the sale must be licensed both as an itinerant vendor and as a public auctioneer.

May 20, 1954



Honorable Philip A. Grimes
Prosecuting Attorney
Boone County Courthouse
Columbia, Missouri

Dear Sir:

By letter dated May 10, 1954, you requested an official opinion as follows:

"Recently, some individuals and companies, both residents of Missouri and non-residents, have been conducting public auctions about this county, whereby they propose to sell new but second class or rejected merchandise such as vacuum cleaners, lamps, irons, sporting goods and other items too numerous to mention. It is the practice to advertise such sales with the name of a local auctioneer. This auctioneer then cries the sale, which may be conducted at a local sales barn or similar place.

"The local retail merchants are complaining because the above mentioned business is not taxable locally and they feel it is therefore unfair competition.

"In checking one such sales organization I found it to be an Illinois corporation which had been duly licensed under the Itinerant Vendors Section under the statutes 150.380 to 150.460. I believe the sales tax is still applicable under this section. I find, however, that the local auctioneer, over who's

Honorable Philip A. Grimes

name the sale was advertised, does not have a public auctioneer's license as provided in chapter 343 of the statutes. I find further that none of the servants, agents or employees of the Illinois corporation who incidentally assisted the local auctioneer in crying the sale, were so licensed as public auctioneers.

"My question is, assuming that all the provisions of the itinerant vendors statutes have been complied with, is it necessary that the auctioneers be licensed under chapter 343? This question covers both auctioneers, the local auctioneer who cries the sale for a percentage and the company auctioneer who cries it as a part of his employment."

All statutes cited herein are RSMo 1949.

"Itinerant vendor" is defined by Section 150.380 as follows:

"1. The words 'itinerant vendor,' for the purposes of sections 150.380 to 150.460, shall mean and include all persons, both principal and agents, who engage in, or conduct, in this state, either in one locality or in traveling from place to place, a temporary or transient business of selling goods, wares and merchandise with the intention of continuing in such business in any one place for a period of not more than one hundred and twenty days, and who, for the purpose of carrying on such business, hire, lease or occupy, either in whole or in part, a room, building, or other structure, for the exhibition and sale of such goods, wares and merchandise.

"2. The provisions of sections 150.380 to 150.460 shall not apply to sales made to dealers by commercial travelers or selling agents in the usual course of business, nor to bona fide sales of goods,

Honorable Philip A. Grimes

wares and merchandise by sample for future delivery, nor to hawkers on the streets or peddlers from vehicles, nor to any sale of goods, wares or merchandise on the grounds of any agricultural society during the continuance of any annual fair held by such society."

An itinerant vendor is required by Section 150.390 to be licensed.

"1. An itinerant vendor, whether principal or agent, before beginning business, shall take out state and local licenses in the manner herein set forth, but the right of a municipal corporation to pass such additional ordinances relative to itinerant vendors, as may be permissible under the general law, or under its charter, shall not be affected.

"2. Every itinerant vendor desiring to do business in this state shall deposit with the state collector of revenue the sum of five hundred dollars as a special deposit, and thereafter, upon application in proper form, and the payment of a further sum of twenty-five dollars, as a state license fee, such state collector of revenue shall issue to him an itinerant vendor's license, authorizing him to do business in this state, in conformity with the provisions of sections 150.380 to 150.460, for one year from the date thereof."

* * *

The deposit required by the above Section is made subject to claims presented against it by Section 150.440.

"Each deposit so made with the state collector of revenue, shall be subject to attachment and execution on behalf of creditors, whose claims arise in connection with business done in this

Honorable Philip A. Grimes

state, and to the payment of fines and penalties incurred by the licensee, through violation of sections 150.380 to 150.460. Claims under civil process shall be enforced against the state collector of revenue as garnishee, or trustee by action in the usual form, and claims for satisfaction of fines and penalties shall be enforced by the prosecuting attorney serving notice of pendency of action and judgment when obtained upon the state collector of revenue. Claims upon each deposit shall be satisfied after judgment, in the order in which notice of the claim is received by the state collector of revenue, until such claims are satisfied, or the deposit exhausted; but notices filed after the expiration of such sixty days' limit shall not be valid. A deposit shall not be paid by the state collector of revenue to licensees as long as there are outstanding claims or notices of claims against it, unless there is unreasonable delay in enforcing them."

An itinerant vendor is required by Section 150.420 to make certain statements in some instances before he is allowed to sell certain types of goods.

"An itinerant vendor shall not advertise, represent or hold forth a sale of goods, wares or merchandise as an insurance, bankrupt, insolvent, assignee, trustee, estate, executor, administrator, receiver, wholesale, manufacturers' wholesale, or closing out sale, or as a sale of any goods damaged by smoke, fire, water, or otherwise, unless before so doing he shall state, under oath, to the state collector of revenue, either in the original application for a state license, or under a supplementary application subsequently filed and copied on the license, all the facts relating to the

Honorable Philip A. Grimes

reasons and character of such special sale so advertised, held forth, or represented, including a statement of the names of the persons from whom the said goods, wares or merchandise were obtained, the date of delivery of the same to the persons applying for the license, the place from which said goods, wares and merchandise were last taken, and all details necessary to exactly locate and fully identify all goods, wares and merchandise to be sold."

The above statutes indicate that the Legislature in enacting them had in mind the protection of the public from persons who because of their itinerant character are in a position to defraud the public and leave the locality before such fraud is discovered or action can be taken thereon.

Auctioneers are required by Section 343.010 to be licensed.

"No person shall exercise the trade or business of a public auctioneer by selling any goods or other property subject to duty under this chapter, or real estate, without a license."

A license fee is imposed by Section 343.080.

"There shall be levied upon every license, to be paid to the collector before the delivery thereof, as follows:

"(1) On each license for ten days, ten dollars;

"(2) On each license for one month, twenty-five dollars;

"(3) On each license for three months, fifty dollars;

"(4) On each license for six months, seventy-five dollars."

Honorable Philip A. Grimes

There is imposed upon sales at auctions a duty payable to the state. That duty is imposed by Section 343.130.

"There shall be levied and paid upon the proceeds of the sales of all property at auction, except as herein excepted, a duty to the state on the proceeds of all sales of personal property, except corporation stocks, one and a half per cent."

The exceptions referred to are made by Section 343.160:

"Sales of property at auction shall be free of duty in the following cases:

"(1) When directed by any statute of this state or of the United States;

"(2) In executing any order, judgment or decree of any court or magistrate of this state or any court of the United States, in case of bankruptcy or insolvency, pursuant to any law of this state or of the United States;

"(3) When sold by any trustee in conformity to a deed of trust to secure the payment of debts;

"(4) Property of deceased persons sold by authority of executors or administrators;

"(5) Boats, vessels, rafts, lumber and other property wrecked, stranded or found adrift in any of the waters of or adjoining this state;

"(6) Live stock, agricultural productions, farming utensils and household and kitchen furniture sold in the county of the owner's residence;

"(7) Land or leasehold interest therein;

"(8) Each licensed merchant shall have the privilege of selling off, at auction,

Honorable Philip A. Grimes

at the end of every twelve months after the commencement of his business, any refused stock of goods which he may have had on hand for six months preceding, without obtaining an auctioneer's license for that purpose."

Auctioneers are required by Section 343.110 to give a bond.

"Before any license shall be granted, the applicant shall give bond to the state of Missouri in a sum not exceeding three thousand dollars nor less than five hundred dollars, with one or more sufficient sureties, residents of the county, the amount of the bond and the sufficiency of the security to be determined by the collector, with condition that he will on the first Mondays of February, May, August and November in each year, while he shall continue the business of auctioneer, render to the clerk of the county court a true and particular account, in writing of the aggregate amount in money of all property subject to duty by this law, sold by him at auction, or sold at his auction store or rooms at private sale, that is to say: First, from the date of the bond until such of the aforesaid days as shall ensue next thereafter, and thenceforth from the day to which any account shall last have been rendered, until such of the said days as shall next thereafter ensue, and so on in succession, from one of the said days to another so long as he shall continue to exercise the calling of an auctioneer; and also, shall pay all such sums of money as shall be due to the state upon such sales to the collector of the proper county; and the bond shall be filed in the office of the clerk of the county court."

Honorable Philip A. Grimes

Auctioneers are required by Section 343.170 to pay to the collectors of the proper counties the duties imposed by Section 343.130 and are required by Section 343.180 to render under oath to the Clerk of the County Court of the respective county in which they transact business, an account of the sales made by them subject to duty under this chapter.

It is apparent from the above statutes that the purpose of licensing auctioneers is not the protection of the buying or selling public from unscrupulous or incompetent auctioneers, since there are no professional requirements except payment of the license fee. Instead, the purpose of the chapter is to impose a duty upon sales made at auctions, and the auctioneers are required to be licensed and to post bond to insure that the duty owing to the state will be paid.

Thus, the purpose of Section 150.380 et. seq. and the purpose of Chapter 343 are entirely unrelated. We can discover no reason why the licenses required thereunder are exclusive of each other. If a person is both an itinerant vendor and engaging in auctioneering, he should be required to be licensed for both purposes.

You mention that some non-residents may have been acting as auctioneers. Your attention is invited to Section 343.100 which makes the following residence requirement for public auctioneers.

"No person shall be permitted to sell property at auction of any kind unless he shall have resided in this state six months next preceding the time of making application for license."

Enclosed is a previous opinion of this office rendered on December 22, 1933, to Honorable N. R. Aldrich, concerning the licensing of non-resident auctioneers.

CONCLUSION

It is, therefore, the opinion of this office that an itinerant vendor within the meaning of Sections 150.380 et seq., RSMo 1949, who is selling goods at public auction,

Honorable Philip A. Grimes

subject to duty under Chapter 343, RSMo 1949, and is actually crying the sale, must be licensed both as an itinerant vendor and as a public auctioneer.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

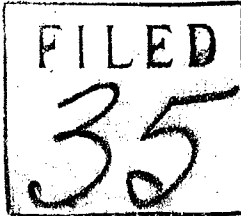
Very truly yours,

JOHN M. DALTON
Attorney General

Enclosure - 12-22-33 to N. R. Aldrich

PMcG:ld,lw

STATE PARK BOARD: State Park Board does not have power to transfer State Park to Missouri Conservation Commission.



June 3, 1954

Honorable Abner Gwinn
Director
Missouri State Park Board
1206 Jefferson Building
Jefferson City, Missouri

Dear Mr. Gwinn:

We render herewith our opinion, based upon your request of May 18, 1954, which request reads as follows:

"The State Park Board is considering the transfer of Big Oak Tree State Park in Mississippi County to the Missouri Conservation Commission. This land was purchased in 1937 and 1938 and deeded to the State of Missouri for the use and benefit of the State Park Board.

"Will you please give me an opinion regarding the authority of the State Park Board to make such transfer."

After examining the pertinent statutes and judicial decisions of Missouri, we have concluded that the State Park Board does not at the present time have authority to transfer the Big Oak Tree State Park in Mississippi County to the Missouri Conservation Commission.

In Aetna Insurance Co. et al. vs. O'Malley, 124 S.W. (2d) 1164, 343 Mo. 1232, the Court said (S.W. 1.c. 1166):

"* * * Before a state officer can enter into a valid contract he must be given that power either by the

Honorable Abner Gwinn:

Constitution or by the statutes. All persons dealing with such officers are charged with knowledge of the extent of their authority and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. Such power must be exercised in manner and form as directed by the Legislature. * * *."

This rule applied in the above case to an individual state officer is likewise applicable to boards, agencies, and commissions of the State such as the State Park Board.

We look then to determine whether any statute or constitutional provision grants to the State Park Board the authority to make the suggested conveyance. The law creating the State Park Board and granting it certain authority is contained in Chapter 253 RSMo Cum. Supp. 1953. We find therein no provision granting the authority to convey any property belonging to the State Park Board, nor do we find such authority in any other statute or constitutional provision.

The fact that the contemplated grantee of the Big Oak Tree State Park is another agency of the State, the Missouri Conservation Commission, would in our judgment make no difference in the foregoing holding.

CONCLUSION

It is, therefore, the opinion of this office that the Missouri State Park Board does not have authority to convey the Big Oak Tree State Park to the Missouri Conservation Commission.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

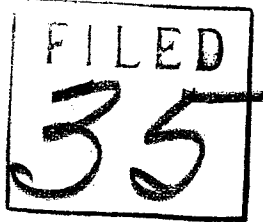
Yours very truly,

JOHN M. DALTON
Attorney General

WDK:irk

COUNTY TREASURER:
COUNTY FUNDS:
CANDIDATE'S FILING FEE:

(1) County treasurer should not commingle public and personal funds in same bank account (2) payment of candidate's filing fee by check drawn on county depositary is valid.



July 16, 1954

Honorable Melvin E. Griffin
Prosecuting Attorney
Clinton County
Plattsburg, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"A question has arisen in my county, a county of the third class, concerning the treasurer's office, in which I would like to have your opinion.

"It is reported to me, that our treasurer uses the same fund and same type of checks to pay both county debts and his personal debts, in at least one bank of this county in which he has an account.

"My question is as to the propriety of drawing checks in this manner for both county business and personal bills; and as to whether the situation is altered by his always having sufficient personal funds on deposit in said account to cover whatever personal checks he may write.

"There is also, along this same line, the further question as to whether there is a valid filing as a candidate for re-election to the office of treasurer, where the treasurer pays the \$5.00 filing fee required by Sec. 120.350 of the Revised Statutes of Missouri, 1949, by a check drawn on the treasurer's fund rather than on his personal account. In the event that he has not

Honorable Melvin E. Griffin

lawfully complied with said section, I am wondering just what the situation is or what procedure should be taken in filling the vacancy, as there are no other candidates of any party that have filed for the office.

* * * * *

The import of your letter is to the effect that the public official referred to therein has commingled personal and public funds in a bank account set up in a county depository and has and is drawing checks upon such account for both personal and public expenditures. It is upon this assumption that this opinion has been written. Checks drawn presumably are pursuant to the provisions of Section 110.240 RSMo 1949, requiring the issuance of checks drawn against such accounts upon the presentation of warrants duly executed by the county court.

We direct your attention to the provisions of Section 54.140 RSMo 1949, which reads as follows:

"It shall be the duty of the county treasurer to separate and divide the revenues of such county in his hands and as they come into his hands in compliance with the provision of law; and it shall be his duty to pay out the revenues thus subdivided, on warrants issued by order of the court, on the respective funds so set apart and subdivided, and not otherwise; and for this purpose the treasurer shall keep a separate account with the county court of each fund which several funds shall be known and designated as provided by law; and no warrant shall be paid out of any fund other than that upon which it has been drawn by order of the court as aforesaid. Any county treasurer or other county officer, who shall fail or refuse to perform the duties required of him or them under the provisions of this section and chapters 136 to 154, RSMo 1949, and in the express manner provided and directed, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars, and not more than five

Honorable Melvin E. Griffin

hundred dollars, and in addition to such punishment, his office shall become vacant."
(Emphasis ours.)

It seems to us that a proper construction of this statute would prohibit the commingling of the personal funds of the county treasurer with the public funds coming into his hands by virtue of his official position. You will note that the statute quoted makes it a misdemeanor for such an official to fail or refuse to discharge the duties imposed upon him by the same statute, which is sufficiently broad to impose such penalty for failure to keep separate all of such public funds.

Aside from this statute the practice is certainly one to be condemned. The commingling of personal funds with those held in a fiduciary capacity, such as are those funds in the hands of the county treasurer, has within it such an inherent vice that we feel it should not be permitted. It is true that county treasurers in counties of the third class are required to furnish bonds for both county moneys and school moneys under the provisions of Sections 54.140 and 54.160 RSMo 1949, respectively. It is further true that the books of account of the treasurer are open to inspection by the county court or any member thereof at all times. The county treasurer is required to make semi-annual settlements with respect to all moneys of a public nature coming into his hands. Further, the county depositaries must make duplicate statements of the balance in the various funds deposited therein, supplying one to the county treasurer and one to the county clerk of such county. These are but additional safeguards to surround the disbursement and custody of public funds. They lend further strength to our belief that to handle the county and school moneys in any manner other than that specifically set forth by statutes relating thereto is not in accord with the public policy of the State and should not be permitted.

You have posed the further question with respect to the validity of the payment of the filing fee required by Section 120.350 RSMo 1949, when such payment is made by a check drawn on other than the personal account of the candidate. The statute mentioned reads in part as follows:

"1. Each candidate, except a candidate for a township office, previous to filing declaration papers, as in sections 120.300 to 120.650 prescribed, shall pay to the treasurer of the state or county central

Honorable Melvin E. Griffin

committee of the political party upon whose ticket he seeks nomination a certain sum of money, as follows:

* * * * *

"(2) To the treasurer of the county central committee: Five dollars if he is a candidate for state representative or any county office.

"2. The candidate shall take a receipt therefor and file such receipt with his declaration papers. The sums of money so paid by the several candidates shall be evidence of their good faith in filing their declaration papers and shall be used as an expense fund by the several political parties upon whose tickets the various candidates seek nomination."

From this statute it is apparent that its purpose is to provide funds for the use of the various committees of the political parties mentioned therein. Therefore, if the check issued in the manner referred to in your letter is paid by the bank upon which drawn, it amounts to a compliance with the terms of Section 120.350 RSMo 1949, even though, as between the county court and the officer, the drawing of such check could possibly amount to a misappropriation of a portion of the public funds in the custody of such official. As further bearing upon this subject, we direct your attention to a previous official opinion of this department delivered under date of June 4, 1954 to the Honorable C. D. Hamilton, State Representative, Ralls County, a copy of which is enclosed herewith.

CONCLUSION

In the premises we are of the opinion:

(1) That a county treasurer in a county of the third class should not commingle personal funds with public funds coming into his hands by virtue of his office; and,

(2) That any payment of the sum of \$5.00 to the treasurer of a county central committee by a candidate for a county office is a complete compliance with the provisions of Section

Honorable Melvin E. Griffin

120.350 RSMo 1949, and such candidate is thereupon entitled to have his name placed on the primary ballot if otherwise qualified.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

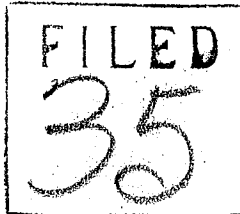
Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

Enclosure: 6-4-54 to C. D. Hamilton

ASSESSORS: Real estate and tangible personal property assessed to one person to be reported to the Department of Revenue in separate entries.



July 29, 1954

Honorable Douglas W. Greene
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads in part as follows:

"I would also like to have your opinion as to whether, under Section 53.110, R. S. Mo. 1949, real estate and tangible personal property assessed to one person should be reported to the Department of Revenue in separate entries or in a combined entry."

We assume for the purpose of this opinion that since you refer to Section 53.110 relating to assessors' fees in counties of the second class, that you are likewise referring to a report to be used by the State Department of Revenue as a basis for computing the State's portion of the assessors' fees. Section 53.110 provides in part as follows:

"The fees for services of the county assessors in counties of the second class shall be thirty cents per list and six cents per entry for making real estate and tangible personal books, all the real and tangible personal property assessed to one person to be counted as one name; * * *"

Honorable Douglas W. Greene

The Supreme Court of Missouri in banc in the case of State ex rel. v. Atterbury, No. 44,438, April Session 1954, S.W. 2d _____, had before it a substantially similar provision (Section 53.130 RSMo Cum. Supp. 1953) relating to the compensation of assessors in counties of the third class not under township organization. The court noted the provision therein contained that "all the real estate and tangible personal property assessed to one person * * * to be counted as one name" and in this regard stated:

"The purpose of these provisions referring to 'name' and 'names' is difficult of ascertainment, because the compensation of the assessor has not been based upon the number of names since the repeal of Section 9196 RSMo 1899 by Laws 1909, p. 717 and the enactment of a new section providing compensation based upon 'per list and 'per entry', * * *."

The court further pointed out that the terms "name" and "entry" as used were not synonymous. The court said:

" * * * There can be no sound contention that the word 'entry' and the word 'name', as used here, are synonymous. * * *"

Therefore, from the foregoing, it is the opinion of this office that since the fees of the assessor are to be computed on the basis of entries (as distinguished from names) in the real and tangible personal books, the real estate and tangible personal property assessed to one person should be reported in separate entries rather than a combined entry.

CONCLUSION

Therefore, it is the opinion of this office that since the assessors' fees are computed on a basis of entries in the real estate book and entries in tangible personal book, the real estate and tangible personal property assessed to one person should be reported to the Department of Revenue in separate entries rather than in combined entries.

Honorable Douglas W. Greene

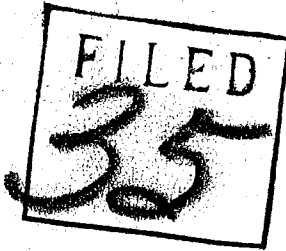
The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG/vtl:vlw

FEMALE EMPLOYEES: Section 290.040, RSMo 1949, is applicable to female employees working in what is in fact either a "restaurant," "laundry" or "snack shop."



September 22, 1954

Honorable Douglas W. Greene
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"I would appreciate receiving your opinion relative to the following application of Section 290.040, Revised Statutes of Missouri, 1949:

"(a) Does the prohibition contained in Section 290.040 with respect to employment of female employees in excess of nine hours per day and 54 hours per week apply to the female employees of a restaurant, laundry, or 'snack shop' operated in connection with and as a part of an educational institution owned and operated by a religious organization?

"(b) Does the prohibition above referred to apply as to stenographic or clerical work performed by female employees at an educational institution owned and operated by a religious organization where the major part of the stenographic or clerical work has to do with the general administration of the institution, but an incidental part of such stenographic or clerical work may have to do with the operation of a restaurant, laundry, or 'snack shop' forming a part of the educational institution?

Honorable Douglas W. Greene

"The restaurant, laundry or 'snack shop' referred to above is maintained for the benefit of the students attending the educational institution."

In this opinion we have assumed that the "snack shop" referred to in your letter of inquiry is in fact a "restaurant." It is our understanding that the establishment does sell food and soft drinks to the public.

Section 290.040, RSMo 1949, referred to in your letter of inquiry, reads as follows:

"No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of establishments and places of industry, herein described, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week; provided, that operators of canning or packing plants in rural communities, or in cities of less than ten thousand inhabitants wherein perishable farm products are canned, or packed, shall be exempt from the provisions of this section for a number of days not to exceed ninety in any one year; provided further, that nothing in this section shall be construed and understood to apply to telephone companies." (Emphasis ours.)

The wording of the statute is clear and unambiguous and by its terms clearly prohibits the employment of females in the enumerated types of businesses for a longer period than nine hours during any one day and more than 54 hours during any one week. In the absence of any ambiguity or uncertainty, no occasion arises

Honorable Douglas W. Greene

for the construction of a statute. The appellate courts follow this rule, and in *Steggall v. Morris*, 258 S.W. 2d 577, 1.c. 582, we find the following expression thereof:

" * * * However, whether remedial or in derogation of the common law, we have no right to change the meaning of a plain and unambiguous statute. *Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 66 S.W. 2d 920, 931 (19,20); Section 1.010 RSMo 1949, V.A.M.S.

"In *State ex inf. Rice ex rel. Allman v. Hawk*, 360 Mo. 490, 228 S.W. 2d 785, loc. cit. 789 (8,9), this court stated the rule thus: 'The language of the statute is clear and unambiguous, and we have no right to read into it an intent which is contrary to the legislative intent made evident by the phraseology employed.'"

What we have said precludes our consideration of the intent of the statute beyond its plain language. We therefore, of necessity, must reach the conclusion that by its own terms the statute prohibits female employees working longer than the hours set forth. We, of course, in this opinion, have assumed that the establishments referred to as being either a "restaurant" or a "laundry" are, in fact, places of employment having the usual characteristics thereof.

Under paragraph (b) of your letter of inquiry you have presented the further question of the applicability of the statute to the rendition of services which are merely "incidental" to services rendered in connection with the general administration of the institution. You have not supplied us with any specific facts respecting the hours devoted to stenographic employment in connection with either the "restaurant" or the "laundry." Absent such information, we can but express our opinion in a general way. It seems that if the hours of stenographic employment in the prohibited businesses were such as to represent hours in excess of those allowed in any one day or any one calendar week, then the statute would be violated, with a contrary conclusion being reached in the event that the total hours did not exceed those limited by the statute.

Honorable Douglas W. Greene

CONCLUSION

In the premises, we are of the opinion that Section 290.040, RSMo 1949, is applicable to the female employees of an educational institution if employed in establishments which are in fact either a "restaurant" or a "laundry," and to the rendition of stenographic services in connection with either or all of such establishments.

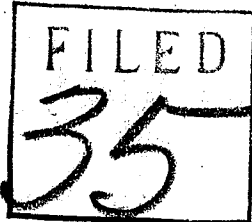
We are further of the opinion that if stenographic employment in either the "restaurant" or "laundry" exceeded the hours limited by the statute in any one day or during any one calendar week, then such employment would violate the terms of the statute even though such employment was merely "incidental" to similar services rendered in connection with the general administration of the institution, with a contrary result, of course, being reached if, as a matter of fact, such employment did not exceed the hours so limited.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

VTV.
WFB/ml



CHILDREN: : Circuit Courts in counties of 3rd and 4th
COURTS: : classes, said counties having populations
CONTEMPT: : of less than 50,000, have the power to make
NEGLECTED CHILDREN: : orders touching upon the custody of neg-
SHERIFFS: : lected children, and the power to direct
: the sheriff to take physical custody of such
: children for the purpose of carrying out
: such orders of the court; and the sheriff
: or any other person willfully or knowingly
: disobeying such an order may be found to be
: in contempt of the court.

.....

November 19, 1954

Honorable G. Derk Green
Circuit Judge
Twelfth Judicial Circuit
Brookfield, Missouri

Dear Judge Green:

By letter dated September 27, 1954, you requested
an opinion of this office as follows:

"A set of facts have developed in this cir-
cuit giving rise to a question that I believe
should be submitted to your office for an
opinion. From these facts it is obvious
that court interpretation is most unlikely
and injury sought to be prevented would oc-
cur before court action or ruling in the
appellate court could be consummated. For
this reason I request your ruling.

"The Prosecuting Attorney filed a petition
in the Juvenile Division of the Court alleg-
ing that two designated children were neg-
lected children within the meaning of the
statutes. Notice of hearing was served upon
the parents. Upon the date set evidence was
heard and the court entered its finding and
order that the children were neglected chil-
dren within the meaning of the statutes, made
them wards of the court and placed them in
the care and custody of the County Director
of the State Department of Public Health and
Welfare.

"Custody was taken by the County Director and
the children provided for in a foster home,
with expense paid out of Welfare funds. Many
months later the mother of the children appear-
ed in court and the court ordered that the
children remain in the status of wards, but
that they be placed in the mother's home under

Honorable G. Derk Green:

the supervision of the County Director. After several months with the children in the mother's home under this arrangement, upon the recommendation of the County Director, after notice to the mother and evidence heard, the court ordered that the children be removed from the mother's home and provided for elsewhere by the County Director.

"The children were not surrendered by the mother and the court then made the further order that the County Director take the physical custody and that the Sheriff be and was thereby directed to carry out and enforce the court order by taking the children physically from the presence of the mother and from the mother's home and deliver them to the custody of the County Director. Certified copy of this order was delivered to the sheriff of the county in which the children were kept.

"The sheriff has declined to serve the order by taking the custody from the mother and delivering physical custody to the director. He takes the position that he has no authority to do so, but that the only method of enforcing the order is by citation for contempt as provided in Section 211.390, R.S.Mo. 1949. No question is made about the form of notice or orders made as above.

"Question One: Does the sheriff have authority to execute the court order?

Question Two: Is it the duty of the sheriff to execute the court order by taking physical custody from the mother?

Question Three: What is the proper method to effect such transfer and give effect to the court order?

"Thanking you, I am"

All statutory citations herein are Revised Statutes of Missouri, 1949.

Honorable G. Derk Green:

It is noted that all counties in your circuit are of the third class, and each county has a population of less than 50,000.

A neglected child is defined by Section 211.310 to be:

"1. Sections 211.310 to 211.510 shall apply to children under the age of seventeen years, in counties of the third and fourth classes, who are not now or hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children. When jurisdiction has been acquired under the provisions hereof over the person of a child, such jurisdiction shall continue, for the purpose of sections 211.310 to 211.510, until the child shall have attained the age of twenty-one years.

"2. For the purpose of sections 211.310 to 211.510, the words 'neglected child' shall mean any child under the age of seventeen years, who is homeless or abandoned, or who habitually begs or receives alms, is found living in any house of ill-fame; or with any vicious or disreputable person, or who is suffering from depravity of its parents, or other person in whose care it may be."

The Circuit Court in counties of less than 50,000 population is given original jurisdiction over cases involving neglected children by Section 211.320.

The court is empowered by Section 211.390 to provide for the custody of neglected children. That section reads, in part, as follows:

"1. When any child coming under the provisions of sections 211.310 to 211.510 shall be adjudged to be neglected or delinquent or in need of the care of discipline and protection, the court may make an order committing the child, under such conditions

Honorable G. Derk Green:

as it may prescribe, to the care of some reputable person of good moral character, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for neglected children, or to any institution incorporated under the laws of this state that may care for children, or to any institution or agency which now is or hereafter may be established by the state or county for the care of children; or the court may place the child in the care and control of a probation officer, and may allow such child to remain in its home subject to the visitation and control of the probation officer, to be returned to the court for further proceedings whenever such action may appear to the court to be necessary; or the court may authorize the child to be placed in a suitable family home, subject to the friendly supervision of a probation officer and the further order of the court; or it may authorize the child to be cared for in some suitable family home in such manner as may be ordered by the court or may arrange for same through voluntary contributions or otherwise until suitable provision may be made for the child in a home without such payment.

* * * * *

"3. After any child shall have come under the care or control of the juvenile court as herein provided, any person who shall thereafter knowingly contribute to the delinquency or neglect of such child, shall knowingly disobey, violate or interfere with any lawful order of said court, with relation to said child, shall be guilty of contempt of court, shall be proceeded against as now provided by law and punished by imprisonment in the county jail for a term not exceeding six months or by a fine not exceeding five hundred dollars or by both such fine and imprisonment.

Honorable G. Derk Green:

Since the Circuit Court has the power to order that custody of the children be given to the person mentioned in your letter, it has the power, under Section 476.070, to enforce such an order. Said section reads:

"All courts shall have power to issue all writs which may be necessary in the exercise of their respective jurisdictions, according to the principles and usages of law."

Sheriffs are required by Section 57.100 to " * * * execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by magistrates." Therefore, the sheriff is obliged to execute the order of your court.

In addition to the inherent power of a Circuit Court to punish for contempt, disobedience of a lawful order of the court is declared by Section 211.390.3, supra, to be contempt. Further, Section 476.110 provides:

"Every court of record shall have power to punish as for criminal contempt persons guilty of

* * * * *

"(3) Willful disobedience of any process or order lawfully issued or made by it;"

Thus, a knowing or willful disobedience of a lawful order of the court constitutes contempt of that court, and may be punished.

CONCLUSION

In the premises, therefore, it is the opinion of this office that the Circuit Courts in counties of the third and fourth classes, said counties having populations of less than 50,000 each, have the power to make orders touching upon the custody of neglected children, and the power to direct the sheriff to take physical custody of such children for the purpose of carrying out such orders of the court. The

Honorable G. Derk Green:

sheriff or any other person willfully or knowingly disobeying such an order may be found to be in contempt of the court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

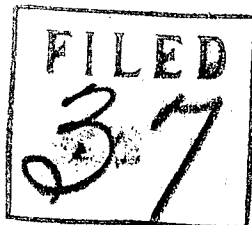
JOHN M. DALTON
Attorney General

PMcG:irk

DEPARTMENT OF CORRECTIONS:
PENAL INSTITUTIONS:
PERSONNEL OFFICERS:
PUBLIC OFFICERS:

Department of Corrections of the State of Missouri may, within its discretion, establish a bureau of personnel pursuant to Section 216.050, RSMo 1949, and said department may, within the limits

of its appropriation for such purposes, employ such personnel as it considers necessary to discharge the functions of that bureau. It is within the discretion of the Department of Corrections whether to appoint a person to supervise said personnel bureau.



February 15, 1954

Honorable C. D. Hamilton
Representative, Ralls County
New London, Missouri

Dear Sir:

By letter of January 30, 1954, you requested an official opinion as follows:

" * * * After Mr. J. K. Walsh left the office of Personnel, Division of Penal Institutions, Mr. Thomas E. Whitecotton, Director of Penal Institutions, instead of appointing another man, took charge of the office himself.

"Wasn't this office set up by statute? If so, shouldn't it be filled? If it is of no use, then we should abolish it."

The only statutory authorization for establishing a personnel bureau within the Department of Corrections is by Section 216.050, RSMo 1949:

"The department of corrections may establish such bureaus as research and statistics, personnel, finance and other bureaus which it may deem necessary and desirable in carrying on the work of the department."

Honorable G. D. Hamilton

Note particularly that the statute states that such a bureau "may" be established. The Supreme Court of Missouri in *State ex rel. v. Holt County Court*, 39 Mo. 521, l.c. 524, gives this rule as to when the word "may" should be construed as mandatory, rather than as permissive:

"* * * Quite a list of authorities, touching the proper construction of the word 'may' as used in statutory enactments, has been presented in the petitioner's brief, all of which have been carefully examined. These authorities are uniformly to the effect that the word is only to be construed as mandatory for the purpose of sustaining or enforcing a right, but never to create one. * * *"

Thus it is concluded that the Legislature has given permission to establish such a bureau, but that the statute does not absolutely require the Department of Corrections to establish a personnel bureau. Mr. J. K. Walsh was for some time the personnel officer of the personnel bureau of the division of penal institutions. There is no statute setting up the office of "personnel officer." The Supreme Court of Missouri in *State v. Pretended Consolidated School Dist. No. 3 of St. Charles County*, 240 S.W. (2d) 946 declared the primary purpose of statutory construction to be, l.c. 950:

"The primary purpose of statutory construction is to ascertain and give effect to the expressed legislative intent.
* * *"

In interpreting a statute we must further be guided by Section 1.090, RSMo 1949, which reads as follows:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

Therefore, in taking the words and phrases of Section 216.050, quoted above, in the plain and ordinary sense, it must be concluded that the Legislature intended to leave to the discretion and judgment of the Department of Corrections whether a bureau of personnel is necessary, and to

Honorable C. D. Hamilton

give that department discretionary authority to employ the personnel it considers necessary to discharge the functions of said bureau, within the limit of moneys appropriated for such purpose.

CONCLUSION

In the premises, therefore, it is the opinion of this office that the Department of Corrections of the State of Missouri may, within its discretion, establish a bureau of personnel pursuant to Section 216.050, RSMo 1949; and said department may, within the limits of its appropriation for such purposes, employ such personnel as it considers necessary to discharge the functions of that bureau. It is within the discretion of the Department of Corrections whether to appoint a person to supervise said personnel bureau.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul McGhee.

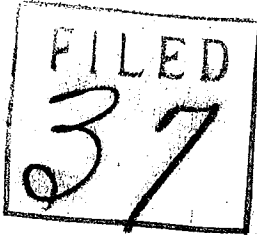
Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:vlw

OFFICERS: Offices of mayor of fourth class city and county clerk of third class county are not incompatible and both may be held by same person at same time.

March 12, 1954



Honorable Lane Harlan
Prosecuting Attorney
Cooper County
Beonville, Missouri

Dear Sir:

Your recent request for a legal opinion of this department has been received, and reads as follows:

"I would appreciate very much if your office could give to me an opinion on the following question: 'Are the offices of mayor of a city of the fourth class and County Clerk in a county of third class incompatible so that one individual cannot hold both offices at the same time?'"

No constitutional or statutory provisions of Missouri prohibit one from holding the offices of mayor of a fourth class city and county clerk of a third class county at the same time.

At common law, incompatible offices could not be held by one person at the same time, and since the common-law doctrine is still in effect in Missouri, we must determine whether the offices mentioned in the opinion request are compatible or incompatible before attempting to answer such inquiry.

The general rule as to when offices are considered to be incompatible has been stated in Am. Jur., Vol. 42, page 936, as follows:

" * * * They are generally considered incompatible where such duties and functions are inherently inconsistent and

repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices. There is no incompatibility between offices in which the duties are sometimes the same, and the manner of discharging them substantially the same. Nor are offices inconsistent where the duties performed and the experience gained in the one would enable the incumbent the more intelligently and effectually to do the duties of the other."

The common-law doctrine of compatible and incompatible offices was stated and applied in the case of Walker v. Bus, 135 Mo. 325, which appears to be the leading case in Missouri on this subject. In this case it was held that the office of deputy sheriff of the City of St. Louis was not incompatible with that of school director and could be held by the same person at the same time. At l.c. 338 the court said:

"v. The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the

number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officer, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in People ex rel. v. Green, 58 N.Y. loc.cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.'"

As to whether there is any inconsistency in regard to the duties of mayor of a fourth class city and those of county clerk of a third class county, so that one person cannot hold both offices at the same time, will require a consideration of the statutes relating to the nature and duties of each office. We, therefore, direct your attention to the following sections of the Missouri Revised Statutes, 1949, namely Sections 79.110, 79.120 and 79.200, which sections give the principal duties of the office of mayor of a fourth class city:

Sec. 79.110. "The mayor and board of aldermen of each city governed by this chapter shall have the care, management and control

of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

Sec. 79.120. "The mayor shall have a seat in and preside over the board of aldermen, but shall not vote on any question except in case of a tie, nor shall he preside or vote in cases when he is an interested party. He shall exercise a general supervision over all the officers and affairs of the city, and shall take care that the ordinances of the city, and the state laws relating to such city, are complied with."

Sec. 79.200. "The mayor shall be active and vigilant in enforcing all laws and ordinances for the government of the city, and he shall cause all subordinate officers to be dealt with promptly for any neglect or violation of duty; and he is hereby authorized to call on every male inhabitant of the city over eighteen years of age and under fifty, to aid in enforcing the laws."

Section 51.120, RSMo 1949, provides the general duties required of county clerks, and reads as follows:

"Every clerk of a county court shall keep an accurate record of the orders, rules, and proceedings of the county court, and shall make a complete alphabetical index thereto; issue and attest all process, when required by law, and affix the seal of his office thereto; keep an accurate account of all moneys coming into his hands on account of fees, costs or otherwise, and punctually pay over the same to the persons

entitled thereto; provided, that when the clerk of the circuit court of his county is a party, plaintiff or defendant, to a suit or action, the writ of summons and all other process relating thereto shall be issued by the clerk of the county court, the reason therefor being noted on said process, and said clerk of the county court shall, on the trial of such cause, act as temporary clerk of the circuit court and otherwise perform all the duties of the clerk of the circuit court."

From the provisions of the above-quoted statutes pertaining to the office of mayor, it appears that the mayor is the chief executive of a fourth class city. As such officer, he has general supervision and control over all other officers and affairs of the city. The statute also provides that he shall be vigilant in the enforcement of all laws and ordinances for the government of the city. It is noted that the powers and duties of the mayor prescribed by statute are limited to the enforcement of all laws, ordinances, and affairs of the city of which he is mayor and that he has no powers or duties to perform as such, nor does he have any supervision or control over any other officers or political subdivisions of the state.

From the provisions of Section 51.120, supra, it is apparent that the county clerk is a ministerial officer whose chief duty is the keeping of an accurate record of all proceedings had by the county court of which he is clerk. While there are other duties to be performed by the county clerk than those specified in this section, none of such other duties are pertinent to the matter of inquiry, and we believe it is unnecessary to mention them herein.

Long ago the lawmakers of this state saw fit to create the offices of mayor of a fourth class city and county clerk. Each office is separate and distinct from the other, as each is necessarily and fundamentally different from the other insofar as the purpose and duties of each are concerned, and neither has any connection in this respect with the other.

As has been mentioned above, the duties of the former office are concerned only with governmental and other affairs of the city, and that the mayor has no powers or duties to perform with reference to the citizens or over any other political subdivision of the state than that of his own city.

It will also be recalled that the chief duties of the county clerk are the keeping of the records of all county court proceedings,

and that such officer is not required to perform any duties of the nature of those required of the former officer, and that neither officer in his capacity as such has been given any supervisory control over the other by law. It further appears that the duties of one of such offices are not so inconsistent or repugnant or conflicting with those of the other so that one person could not hold both offices and faithfully and efficiently perform the duties of both offices at the same time.

It is, therefore, our thought that the offices of mayor of a fourth class city and county clerk of a third class county are compatible and that one person may legally hold both offices and perform the duties of each at the same time.

CONCLUSION

It is the opinion of this department that the duties of the office of mayor of a city of the fourth class are not repugnant or incompatible with those of clerk of the county court of a county of the third class and that one person may hold both offices at the same time.

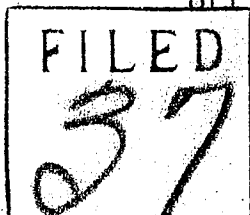
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC:sm

ELECTIONS: One who filed declaration of candidacy for nomination of state representative within time and manner prescribed by Section 120.340 RSMo 1949, but at time failed to present receipt or other evidence that fee required by Section 120.350 RSMo 1949 was previously paid to treasurer of county central committee of party upon whose ticket candidate is running, but on same day, subsequent to filing of declaration, fee is paid and no receipt obtained therefor, candidate has substantially complied with Sections 120.340 and 120.350 RSMo 1949, and his name must be printed upon official ballot.



June 4, 1954

Honorable C. D. Hamilton
State Representative
Ralls County
New London, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion, as shown by said request and attached correspondence. The inquiry reads in part as follows:

"A man filed for an office here in the county, instead of paying the money to the treasurer and getting a receipt, turning it over to the County Clerk for filing, he went to the County Clerk, personally signed the treasurer's name by him, then took the money to the treasurer. Is this within the scope of the law?"

Neither the inquiry ^{nor} statement of facts of the original letter were clear to us, and we requested that you explain both more fully. From such explanation we understand the facts involved to be substantially as follows:

Upon April 27, 1954, Chester Davis, apparently a citizen of Ralls County, Missouri, filed a declaration of his candidacy for the Democratic nomination of state representative, to be voted upon in the primary election to be held in Ralls County in August, 1954. The declaration was filed with the county clerk of said county, and accompanying the declaration was what purported to be a receipt, showing that the sum of \$5.00 had been paid by Davis to the treasurer of the Democratic Central Committee of such county. The receipt has been described as an ordinary receipt,

Honorable C. D. Hamilton

except that it was written by Davis, who signed the treasurer's name thereto and underneath which was placed the words "by Chester Davis." The purported receipt appeared to evidence the fact that Davis had paid the \$5.00 filing fee required by law to the treasurer of the political party upon whose ticket he proposed to run in the coming primary election. No date is given, but from the facts we assume that the receipt bore the same date as the declaration, namely, April 27, 1954.

The statement of facts goes into further details and discloses that the receipt was unauthorized and certainly not what it purported to be. Said facts show that on the same day, after he had filed his declaration, Davis went to Center, Missouri, where he contacted the treasurer of the county central committee and paid to her the \$5.00 filing fee required by statute. This was the first notice the treasurer had received of Davis' candidacy and it is obvious that Davis made no attempt to contact her or to pay the filing fee previous to filing his declaration. Upon receiving such fee, the treasurer did not issue her official receipt to Davis evidencing such payment, nor has she ever issued her receipt to him for same. It is stated that she has not at any time authorized Davis to issue the receipt here in question or to sign her name, by him to said receipt.

No reason is given why Davis made no effort to pay the fee to the treasurer previous to filing his declaration, and since the statement of facts fails to indicate that subsequent to the writing of the receipt the treasurer ratified the writing of same, we must assume that no ratification was ever made; that Davis was unauthorized to write same, and that such receipt was void and of no effect.

In view of the explanation given, we understand that the question intended to be presented in the original opinion request is: Whether or not Chester Davis is entitled to have his name printed upon the official ballot as a candidate for the Democratic nomination of state representative, and to have same submitted to the voters in the primary election to be held in Ralls County, Missouri, in August, 1954.

In other words, has Davis sufficiently complied with the applicable Missouri statutes pertaining to the filing of declarations of candidacy for nomination to public office, and payment of a filing fee required by said statutes, at the time he filed his declaration and purported receipt with the county clerk, so that

Honorable C. D. Hamilton

his name could be printed upon the official ballot, and more particularly, has he sufficiently complied with Sections 120.340 RSMo 1949 and 120.350 RSMo 1949? Section 120.340 RSMo 1949 reads as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election unless such candidate has on or before the last Tuesday of April preceding such primary filed a written declaration, as provided in sections 120.300 to 120.650, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:

I, the undersigned, a resident and qualified elector of the (. . . precinct of the town of . . .), or (the . . . precinct of the . . . ward of the city of . . .), or the . . . precinct of . . . township of the county of . . . and state of Missouri, do announce myself a candidate for the office of . . . on the . . . ticket, to be voted for at the primary election to be held on the first Tuesday in August, . . ., and I further declare that if nominated and elected to such office I will qualify."

Section 120.350 RSMo 1949 reads as follows:

"(1) Each candidate, except a candidate for a township office, previous to filing declaration papers, as in sections 120.300 to 120.650 prescribed, shall pay to the treasurer of the

Honorable C. D. Hamilton

state or county central committee of the
political party upon whose ticket he seeks
nomination a certain sum of money, as follows:

* * * * *

"(2) To the treasurer of the county central
committee: Five dollars if he is a candi-
date for state representative or any county
office.

"2. The candidate shall take a receipt therefor and file such receipt with his declaration papers. The sums of money so paid by the several candidates shall be evidence of their good faith in filing their declaration papers and shall be used as an expense fund by the several political parties upon whose tickets the various candidates seek nomination." (Underscoring supplied.)

We understand the chief objection of the opinion request is that the receipt for Davis' filing fee is insufficient, and that he has failed to comply with the law in paying his filing fee and in obtaining a proper receipt for such payment, previous to filing the declaration.

As to whether or not Davis has specifically complied with the statutory requirements will, of course, depend upon the construction to be given said sections.

The only function of a receipt of this nature is to present evidence to the county clerk that the prospective candidate has paid the necessary filing fee to the appropriate committee treasurer, previous to filing his declaration, so that the receipt can be filed with, but not necessarily at the same time, as the declaration. If the prerequisites mentioned by the above quoted sections have been complied with, then it becomes the county clerk's duty to file said declaration papers, and such candidate's name must be printed upon the ballot, and, conversely, if the candidate fails to comply with said statutory requirements he is not entitled to have his name printed upon the ballot.

Honorable C. D. Hamilton

In the event Davis had previously paid the filing fee and had never received a receipt from the treasurer this would have been a sufficient compliance with Sections 120.340 and 120.350, supra. Such was declared to be the law by the Supreme Court in the case of State ex rel. Haller v. Arnold, 277 Mo. 474. At l.c. 480 the court said:

"* * * That question is: Does Section 6015 of the act supra, above quoted, absolutely require as a condition precedent to the placing by the Board of Election Commissioners of the name of a proposed non-partisan candidate on the official ballot, that the receipt of the City Treasurer for the deposit of the sum of sixty dollars shall be filed along with, and contemporaneously with the certificate of nomination of such proposed candidate?

"We have concluded that is does not. The affirmative of the question stated and presented by the facts here at issue would in our opinion and in the light of the language of the above section be too narrow a view to take of the meaning of that section. Such a view would inevitably restrict and circumscribe the right of a citizen to be a candidate for office within such limits and hedge the privilege about with such conditions as materially to impinge upon the guarantee of the Constitution that 'all elections shall be free and open' (Section 9, Article 2, Constitution 1875.) It will be noted that the statute uses the word 'with' only, without qualifying this word by the word 'contemporaneously' or other similar word connoting, or importing, simultaneity of filing of both the receipt for the deposit and the certificate of nomination. Clearly, the language used imports and requires the filing of this receipt at the same place and with the same officer with whom such certificate of nomination is filed. * * *

Honorable C. D. Hamilton

"It is manifest that any eligible candidate for office is entitled to the whole of the last day allowed by law within which to submit himself to the electors for their suffrages. In a case like this, where the proposed candidate is in no wise at fault (the argument that he should have made up his mind earlier obviously having no weight, by reason of the truth of the premise last above) ought he to be deprived of the privilege of running for a public office by the mere adventitious fact of the absence from his office, or from the city, or from the state, of the only officer from whom the required official receipt can under the letter of the law be obtained? The Treasurer might be ill, or a case can be imagined where the death of the Treasurer might occur on the last day for filing prescribed by the letter of the statute, and wherein it would be impossible to appoint his successor in time to have such successor accept the required deposit and issue the required receipt therefor. * * * all that should be required is the earliest possible payment and obtention and filing thereafter of such receipt: provided, such filing of the receipt shall be in time to allow of the performance by the Board of Election Commissioners of the very first of the ensuing duties incumbent upon them by law. * * *

It has long been a cardinal rule of statutory construction, as declared by the appellate courts of this state, that the statute under consideration must be given that construction which would give effect to the intent of the legislators and that such intent if possible shall be ascertained from the words expressed. The words of such a statute shall be given their common or ordinary meaning unless from the context it appears that some other or different meaning was intended.

Another important statutory rule of construction is that the legislators are presumed to have passed a reasonable and constitutional statute rather than an unreasonable and unconstitutional one.

Honorable C. D. Hamilton

These rules are so firmly established that we believe it would serve no useful purpose to cite any Missouri court decisions supporting them.

Keeping these rules of statutory construction in mind, we turn our attention to the construction of Sections 120.340 and 120.350 supra. It must be remembered that said sections are a part of the election laws, and that such laws are to be construed liberally in order to effectuate the purposes for which they were enacted, namely, that the right of suffrage, and to run for public office shall not be unduly or unreasonably restricted. To construe said laws in any other manner would be in violation of those constitutional provisions which declare that all elections shall be free and open. In the case of Haller v. Arnold supra, among other matters passed upon, the court upheld above mentioned principle as the law and at l.c. 480 said:

"* * * Such a view would inevitably restrict and circumscribe the right of a citizen to be a candidate for office within such limits and hedge the privilege about with such conditions as materially to impinge upon the guarantee of the Constitution that 'all elections shall be free and open' (Section 9, Article 2, Constitution 1875.)* * *"

(Said constitutional provision is now Section 25, Article I, Constitution of 1945.)

If a strict construction of the above mentioned sections is to be given then it would unquestionably be the mandatory duty of a candidate to file a declaration within the time required and to present a receipt to the county clerk (though not necessarily at the same date of filing the declaration) evidencing the payment of the fee mentioned in Section 120.350 supra. Failing in this particular, such candidate would not be entitled to have his name printed upon the official ballot.

On the other hand, if a liberal, rather than a strict, narrow, or technical construction of these statutes is to be adopted, said statutes should be construed as requiring a candidate for nomination to public office to file his declaration with the county clerk of the candidate's county within the period specified and to present a receipt or some other evidence showing the prior payment of the fee to the appropriate treasurer of the political central committee, that is, the fee must be previously paid to the treasurer if this is

Honorable C. D. Hamilton

possible. In the event the candidate pays the fee before the date for filing declarations has expired and is entitled to the treasurer's receipt for such payment, but never receives one, he has sufficiently complied with the statutes and is entitled to have his name printed upon the ballot.

It is our further thought that a liberal construction of such statutes would permit the candidate to file a receipt showing payment of the fee written after the filing of the declaration but before the statutory period for filing of the declaration had expired. In the event the fee had been paid either before or after the declaration, but before the expiration date for filing declarations, and no receipt was ever issued, then we believe this is a sufficient compliance with the statute.

It is our further belief that only a liberal construction of these statutes can be adopted if the legislative intent is to be followed, hence, we shall construe them liberally in accordance with the ideas which we have mentioned above. To sustain our position in this respect, we again turn to that part of the opinion in Haller v. Arnold shown in the last paragraph of same quoted on page 6 above and we believe this is a sufficient reason for our holding to a liberal construction of the statutes here in question.

From the facts given above, it appears to be true that when Davis filed his declaration, he did not present a true receipt showing previous payment of the fee to the county committee treasurer since he had not previously made the required payment. However, he did pay such fee upon April 27, 1954, which was the last day he could legally do so, and he had the right to pay it at any time during said day. The payment of the fee, and not the obtaining of the receipt showing such payment is the essential requirement of the statute. Davis was entitled to his receipt whether or not he ever received one, and these facts could, and may have been known to the county clerk. The payment of the fee after the declaration was filed but before the expiration of the filing date was only an irregularity in the performance of the statutory requirements, and in view of the fact that Davis has performed all of such requirements, under a liberal construction of the statutes, his name must be printed upon the official ballot as a candidate for the Democratic nomination for state representative at the primary election to be held in Ralls County in August, 1954.

Honorable C. D. Hamilton

CONCLUSION

It is the opinion of this department that one who filed a declaration of his candidacy for the nomination of state representative within the time and manner prescribed by Section 120.340 RSMo 1949, and at such time did not present a receipt or other evidence showing that the fee required by Section 120.350 RSMo 1949 had been previously paid to the treasurer of the county central committee of the political party, upon whose ticket said candidate is running, but that upon the same date and subsequent to the filing of the declaration the fee was paid and no receipt obtained therefor; that said candidate has substantially complied with the provisions of Sections 120.340 and 120.350 RSMo 1949, and his name must be printed upon the official ballot and submitted to the voters at the primary election in which he seeks nomination.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

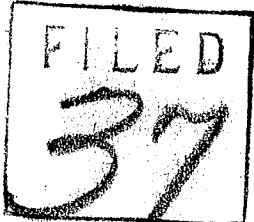
Yours very truly,

JOHN M. DALTON
Attorney General

PNC:sm

CHIROPODY:
REVOCATION OF
LICENSE:

Advertising by a person licensed to practice chiropody, in violation of the code of professional ethics promulgated by the state board of chiropody, is not sufficient basis for the revocation of the license.



December 14, 1954

Honorable L. A. Hansen, D.S.C.
Secretary, Missouri State Board of
Chiropody
800 Professional Building
Kansas City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"The Missouri State Board of Chiropody would like to have an official opinion from your office on the following question: Does the Board have the power to revoke a chiropody license of a chiropodist who advertises directly or indirectly? I refer you to Section 330.160; (9) His unprofessional conduct?

"Enclosed you will find Dr. _____ advertisement that has been published in a St. Louis newspaper and other newspapers outside of St. Louis. Dr. _____ of St. Louis appeared before this Board on October 8, 1954 here in Kansas City. He asked the Board to get an official opinion, and said he would conform to that opinion.

"Enclosed you will find a copy of our law which was passed in 1951; also the rules and regulations of this Board which were adopted in 1950 and recorded with the Secretary of the State of Missouri. On page 16 of the Standard of Proficiency which includes the Rules and Regulations of this Board, (c) reads as follows: 'It shall be considered unethical to advertise directly or indirectly by radio, newspapers, telephone directory, magazine.....'

Honorable L. A. Hansen, D.S.C.

"The Chiropody Board feels that Dr. _____ is advertising indirectly as per the enclosed advertisement. Under Section 330.140, the Chiropody Board is given the power to formulate rules and regulations governing actions of the board.

"I called the Secretary of the New York Dental Board to get the name and number of the decision of the Court of Appeals in the Bell case. I am enclosing copy of letter from Dr. Beier. I am enclosing the Code of Ethics of the Missouri Association of Chiropodists, which has been accepted by the Missouri State Board of Chiropody to explain unprofessional conduct. Nearly every chiropodist in the State of Missouri and the Missouri State Board of Chiropody do not approve of advertising directly or indirectly. The majority of chiropodists want to keep the profession of chiropody on a high plane so that it may be respected along with other upright professions. By not permitting the chiropodists to advertise, we feel that we are doing much to help to protect the health, welfare, and safety of the people of the State of Missouri. If there is any more information that you need, please feel free to call upon me."

In this opinion the Attorney General is not passing on the question of whether or not the clipping enclosed by you constitutes advertising by a chiropodist. The opinion is being written on the assumption that truthful advertising has been engaged in by a chiropodist. The only question being discussed in this opinion is the question of truthful advertising. The question of whether false, misleading or deceitful advertising would be unprofessional conduct is not passed on.

The Missouri State Board of Chiropody is only authorized to revoke a license for a violation, by a licensee, of any one or more of the several provisions of Section 330.160, RSMo. Cum. Supp. 1953.

Advertising, which is your complaint against Dr. _____ could only come under subparagraph 9 of the above section, which is "unprofessional conduct".

Now in your "Standard of Proficiency, Laws, Rules and Regulations governing The Practice of Chiropody," on page 15, "Code of Professional Ethics", the statement is made that "the State Board of Chiropody may revoke or refuse to renew any chiropodist's license, after notice and hearing for any one or more of the following

Honorable L. A. Hansen, D.S.C.

causes (e) unprofessional conduct, as defined by the State Board of Chiropractic.

In your Code of Professional Ethics, referred to above, you state in subsection (c) that,

"It shall be considered unethical to advertise directly or indirectly by radio, in newspapers, telephone directory, magazines, or periodicals, in bold face type in any printed matter, or by electric display signs, or advertising directly or indirectly prices for professional services in any printed matter or on any signs used. All listings in directories of any sort shall be uniform. No practitioner may have any part of his listing printed in any manner that will make such listing distinct from that of his fellow practitioners and under any other listing than chiropractist."

If Dr. _____ is guilty of anything, therefore, it is of violation of subsection (c), supra, which states, not that advertising is "unprofessional conduct", but that it is "unethical".

We call your attention to the following portion of the opinion of the Supreme Court of Missouri in the case of State ex rel. Lentine vs. State Board of Health, 65 S.W.(2d) 943, 1.c. 949, as follows:

"* * * Unprofessional conduct as used in statutes does not mean merely unethical conduct as judged by the peculiar standards of the profession but is generally held to mean dishonorable conduct. The mere fact that conduct is unprofessional is not enough to justify revocation but it must have an additional quality, as, for example, be also dishonorable or disreputable. 21 R.C.L. p. 363.* * *"

We also note the following portion of the opinion of the state of Colorado in State Dental Examiners vs. Saville, 8 Pac.(2) 893, as follows:

"* * * The term 'unprofessional' is convertible with 'dishonorable.' Chenoweth v. Medical Examiners, supra, at page 81 of 57 Colo., 141 P. 132, 135. 'Unprofessional conduct' means that which is by general opinion considered to be grossly unprofessional because immoral or dishonorable, as distinguished from a mere violation of a code of professional ethics, prescribed

Honorable L. A. Hansen, D.S.C.

which is by general opinion considered to be grossly unprofessional because immoral or dishonorable, as distinguished from a mere violation of a code of professional ethics, prescribed by a board of health. Aiton v. Board of Medical Examiners, 13 Ariz. 354, 114 P. 962, L.R.A. 1915A, 691.* * *

We do not see that there is anything dishonorable or immoral in the advertising of Dr. _____. It may be unethical according to your Code of Professional Conduct, but as we pointed out, that fact alone is not sufficient grounds for the revocation of a license.

CONCLUSION

It is the opinion of this department that advertising by a person licensed to practice chiropody, in violation of the Code of Professional Ethics promulgated by the State Board of Chiropody, is not sufficient basis for the revocation of the license.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

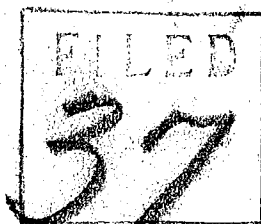
Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

COUNTIES:
CLASSIFICATION OF
COUNTIES:

St. Clair County will become a third class county as of the beginning of the county fiscal year January 1, 1957.



December 17, 1954

Honorable Morran D. Harris
Attorney at Law
Osceola, Missouri

Dear Mr. Harris:

This will acknowledge receipt of your letter of December 6, 1954, wherein as prosecuting attorney-elect you request this office for an official opinion on the following question:

"Our county, St. Clair, has had an assessed valuation of over \$10 million for the past 5 years. It is now a 4th class county. The last five assessed valuations, as certified by the State Tax Commission, are as follows:

| | |
|--------------------------|--------------------------|
| 1950. . . . \$10,560,549 | 1953. . . . \$10,654,589 |
| 1951. . . . 10,492,752 | 1954. . . . 11,329,281 |
| 1952. . . . 10,435,525 | |

"Since the \$10 million valuation is the dividing line between 3rd and 4th class counties, does it not follow that, under the classification law, St. Clair County will become a 3rd class county automatically, on January 1, 1955."

The change in classification of counties is governed by the provisions of Section 48.030 RSMo 1949, which reads as follows:

"For the purpose of determining the initial class of the various counties, the assessed valuations of the respective counties as set forth on pages 333 to 400 of the 'Journal of the Board of Equalization of the State of Missouri for the Year Ending December 31, 1944' shall be used; provided, however, that

Hon. Morran D. Harris

hereafter no county shall be deemed as moving from a lower class to a higher class or from a higher class to a lower class until the assessed valuation of said county shall have been such as to place it in such other class for five successive years; provided further, that the change from one classification to another shall become effective at the beginning of the county fiscal year following the next general election after the certification by the state equalizing agency for the fifth successive year that said county possesses an assessed valuation placing it in another class; provided further, that if a general election shall be held between the date of such certification and the end of the current fiscal year, such change of classification shall not become effective until the beginning of the county fiscal year following the next succeeding general election."

The certification referred to in the above statute is that contained in the annual report of the State Tax Commission, which is made pursuant to the requirements of Section 138.440, RSMo. 1949, and which must contain all of its proceedings and decisions while acting as a board of equalization. Such report contains the finally complete and accurate determination of the assessed valuation of the various counties of the state. This report covering the activities of the State Tax Commission is made as of December 31st of each year.

An assessed valuation of ten million dollars is the dividing line between third and fourth class counties, Section 48.020, RSMo 1949. You state that St. Clair County has had an assessed valuation in excess of ten million dollars for the years 1950, 1951, 1952 and 1953. You also state that the assessed valuation for the year 1954 is in excess of ten million dollars. However, from the above it will appear that this figure for 1954 is not the final certification contemplated by the above-quoted provisions of Section 48.030, but is a preliminary figure, and that the certification to be used in determining the classification of St. Clair County is that to be found in the annual report of the State Tax Commission for 1954 which will be made as of December 31, 1954. Assuming, (and it appears reasonable to do so) that this certification when made will show an assessed valuation for St. Clair County in excess of ten million dollars, it will then be true that St. Clair County

Hon. Morran D. Harris

has had an assessed valuation, as certified by the State Equalization Agency, for five years and thus, St. Clair County will have met the valuation qualifications for a change from a fourth class county to a third class county. On the basis of this assumption, and applying such assumed facts to the provisions of Section 48.030, it appears that the certification of assessed valuation in excess of ten million dollars for the fifth successive year will be made as of December 31, 1954. The next general election after such certification will occur in November, 1956, and under the provisions of said Section 48.030, St. Clair County would become a third class county as of the beginning of its fiscal year following said general election of 1956. Under the provisions of Section 50.010, RSMo 1949, the county fiscal year runs from January 1st to December 31, of each calendar year, and, therefore, the effective date of the change of classification of St. Clair County from a county of the fourth class to a county of the third class would be at the beginning of its fiscal year, January 1, 1957.

While the statutes require the state auditor to give notification of such a change, his action in so doing is purely ministerial and will not affect the happening of such change. See in this connection opinion of this office dated November 22, 1954, to Honorable Stephen R. Pratt, prosecuting attorney, Clay County, a copy of which is enclosed herewith.

As to any problems which may arise in this connection because of the change in compensation of the various county officials, see the opinion of this office dated January 29, 1953, to Honorable Curt M. Vogel, prosecuting attorney of Perry County, a copy of which is enclosed herewith for your information.

CONCLUSION

It is therefore, the conclusion of this office that St. Clair County will change its classification from fourth class to third class effective at the beginning of its fiscal year, January 1, 1957.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Fred L. Howard.

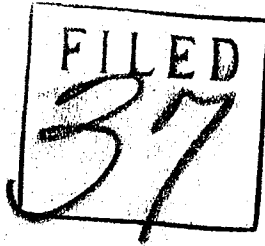
Yours very truly,

John M. Dalton
Attorney General

FLH:sm:mw

Enc. 2 Opinions to
Hon. Stephen R. Pratt, 11-22-54;
Hon. Curt M. Vogel, 1-29-53
cc: Edwin W. Mills
Prosecuting Attorney
Osceola, Missouri

CONSTITUTIONAL LAW: : A statute declaring that the violation by
CHIROPODISTS: : a chiropodist of the Code of Ethics of
LICENSES: : the Missouri Association of Chiropodists
PROFESSIONS: : or the National Association of Chiropodists
: would constitute a ground for revocation
: or suspension of the violator's license
: to practice chiropody in Missouri would
: be unconstitutional, and thus void.
.....



December 31, 1954

Honorable L. A. Hansen, D.S.C.
Secretary
Missouri State Board of Chiropody
800 Professional Building
Kansas City, Missouri

Dear Dr. Hansen:

You recently inquired of this office how to prevent advertising by chiropodists. By letter of December 20, 1954, we suggested that you seek amendment by the Legislature of Section 330.160, RSMo Cum. Supp. 1953, by adding to the twelve existing grounds for revocation of a license to practice chiropody, a thirteenth ground. On December 22, 1954, you wrote to us the following letter:

"I appreciate very much your recommendation as to how to stop advertising. I should like to get your opinion on our adding (14) His unethical conduct as described in the Code of Ethics of the Missouri Association of Chiropodists or the National Association of Chiropodists."

We presume that you contemplate asking the Legislature to add a fourteenth ground upon which a license may be revoked, and you wish our opinion on the constitutionality of the provision.

The legislative power of the State of Missouri is vested, by Article III, Section 1, Constitution of Missouri, 1945, in the General Assembly. The enactment of the provision set forth in your letter would give to two private organizations the power to determine what acts or omissions by chiropodists would authorize revocation of a license granted by the State of Missouri. The question then is whether the giving of such power to the two private organizations would constitute an unlawful delegation of legislative power.

Honorable L. A. Hansen, D.S.C.:

The Supreme Court of Kansas in *State vs. Crawford*, 104 Kan. 141, 177 Pac. 360, 2 A.L.R. 880, considered the validity of a Kansas statute similar in principle to the one you propose. In the *Crawford* case, the defendants were charged with misdemeanors under the Fire Prevention Act which provided that: "'All electrical wiring shall be in accordance with the national electrical code.'" The court in declaring that provision to be void stated:

"But none of the cases cited has ventured so far afield as to intimate that the legislature might delegate to some unofficial organization of private persons, like the National Fire Protective Association, the power to promulgate rules for the government of the people of this state, or for the management of their property, or that the legislature might prescribe punishment for breaches of these rules. We feel certain that no such judicial doctrine has ever been announced.

* * * * *

But the fallacy of such legislation in a free, enlightened, and constitutionally governed state is so obvious that elaborate illustration or discussion of its infirmities is unnecessary. If the legislature desires to adopt a rule of the national electrical code as a law of this state, it should copy that rule, and give it a title and an enacting clause, and pass it through the senate and the house of representatives by a constitutional majority, and give the governor a chance to approve or veto it, and then hand it over to the secretary of state for publication."

We conclude that an attempted delegation by the Legislature to the private organizations you mention, of the effectual power to declare the grounds for revocation of a chiropractist's license, would be an unlawful delegation of power, and thus contravene Article III, Section 1 of the Constitution of Missouri, 1945.

Honorable L. A. Hansen, D.S.C.:

CONCLUSION

It is, therefore, the opinion of this office that a statute declaring that the violation by a chiroprapist of the Code of Ethics of the Missouri Association of Chiroprapists or the National Association of Chiroprapists would constitute a ground for revocation or suspension of the violator's license to practice chiroprapody in Missouri would be unconstitutional, and thus void.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk

CIRCUIT COURT:
COUNTY COURT:
JURISDICTION:

The County Court of Dallas County may, by proper order, designate some other building within the seat of justice of Dallas County as the place to hold circuit court, and that prior to holding court at such new place the sheriff should make proclamation of the new place of holding court.



January 11, 1954

Honorable James P. Hawkins
Judge, 18th Judicial Circuit
Buffalo, Missouri

Dear Sir:

By your letter of December 29, 1953, you requested an official opinion as follows:

"Our Circuit Court Room here in Buffalo is in an unsafe and dangerous condition. The roof was about to cave in a few weeks ago, and the County Court employed carpenters to try to do something with it. We started the trial of a criminal case yesterday morning and then noticed that the roof was about to cave in - we recessed Court and moved to the School House and continued the trial - (whether we had any jurisdiction there or not is now immaterial because it resulted in a nolle by the State). I feel it my duty to no longer use the Court room, and wish you would advise me the procedure for us to undergo so that we can legally hold Court in some other building here in town."

Article V, Section 14, Constitution of Missouri, 1945, requires the circuit court to sit at the time and place prescribed by law:

"The circuit courts shall have jurisdiction over all criminal cases not otherwise pro-

Honorable James P. Hawkins

vided for by law, exclusive original jurisdiction in all civil cases not otherwise provided for, and concurrent and appellate jurisdiction as provided by law. Such courts shall sit at times and places in each county as prescribed by law. (Emphasis ours.)

Dallas County, of which Buffalo is the county seat, is placed in the 18th Judicial Circuit by Section 478.263, Cum. Supp., 1951:

"In the county of Hickory on the first Monday of each of the months of April and September; in the county of Polk on the first Monday in March, the third Monday in June, and the first Monday in December; in the county of Dallas on the first Monday in January, the fourth Monday in April and the first Monday in October; and in the county of Webster on the first Monday in February, the fourth Monday in May and the first Monday in November."

The county court is required to erect and maintain a courthouse, by Section 49.310, RSMo 1949:

"The county court in each county in this state shall erect and maintain at the established seat of justice a good and sufficient courthouse, jail and necessary fireproof buildings for the preservation of the records of the county. * * *"

This section, in effect, gives to the county court the authority, and requires that the county court designate and provide a suitable place for holding circuit court. Thus, the county court may, by proper order, designate any suitable building, at the seat of justice, as the place for holding circuit court. Section 47.300, RSMo 1949, contemplates the change of place of holding court, upon change of the seat of justice, as follows:

"As soon as convenient buildings for the holding of courts, together with a good

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and sufficient jail, can be had at such new seat of justice, the county court shall notify the judges of the several courts holden in the county, at the next term thereof, who shall cause the sheriff to make proclamation at the courthouse door, in term time, that such court will there- after be held at the place so selected." (Emphasis ours).

Although, the above section was enacted in contemplation of removal of the seat of justice from one town or city to another place, it, nevertheless, would seem desirable to give such public notice of the change of place of holding court, even though such change may be merely from one building to another building within the same town or city. Therefore, we conclude that the county court may, by proper order, designate any suitable place within the seat of justice as the place of holding circuit court; and that upon such order, and upon giving the public notice required by Section 47.300, supra, that such new place is the proper place for conducting circuit court.

Although not necessary to answer your question, discussed below are some Missouri cases in which the circuit court was held at a place other than the regular courthouse. In *State v. Peyton*, 32 Mo. App. 522, the defendant was indicted for the crime of burglary and larceny and released upon bond. Defendant failed to appear and the recognizance was declared forfeited. It appeared that the circuit court had for some time been held in "Barrett's Hall," and that the regular courthouse had been condemned. The appellant securities contended that they should have been three times called at the condemned courthouse rather than at Barrett's Hall. The court disposed of that contention, saying at l.c. 528:

" * * * It appears from the record that the courthouse had been condemned, and for some time prior to the date of this forfeiture, Barrett's Hall had been used for a courthouse. As said in *Bouldin v. Ewart*, 63 Mo. loc. cit. 335: 'The very fact of holding the court there necessarily implied a judicial assertion of the right to hold it. It was a de-facto court and its proceedings were not void, even should it be conceded that its session was at a

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place unauthorized by law. This being so, the place where such court was held was, at least pro hac vice, the courthouse.' See also Kane v. McCown, 55 Mo. 189."

In Kane v. McCown, 55 Mo. 181, the circuit court was held in a church, the regular courthouse being occupied by a troop of federal soldiers during the Civil War. The execution sales in question were objected to because the sales were made at the door of the church, rather than at the regular courthouse. This objection was disposed of as follows, l.c. 198:

"But it is urged, that all these sales, having been made at the door of a church or meeting house, in which the Circuit Court at the time held its sessions, in the town of Warrensburg, were therefore void. The evidence clearly established the fact that the sales were at the door of a building not usually used as a court house, but which at the time was so used, because the building regularly appropriated to these purposes was occupied by troops of soldiers, and was otherwise not in a condition to be used as a court house. It is plain that a sale at the door of the deserted court house, where no court was in session, would have been utterly against the spirit and meaning of the law. Whether the County Court had failed to provide a suitable building for holding court, or whether the Circuit Court had selected the building for its session, is not material. It could not be maintained, that the proceedings of the Circuit Court would be invalid, although its sittings were not in a building designated by the County Court. Both buildings were at the county seat of the county. And the obvious meaning of the execution law is to require sales at the door of the building occupied and used as a court house."

In Herndon v. Hawkins, 65 Mo. 265, the validity of an execution sale was questioned because the circuit court was held in a house belonging to one S. I. Forrest, fourteen miles

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from the county seat, at Gainesville, Gainesville had been completely destroyed during the Civil War, and no houses were standing in the town. The county court had ordered the sheriff to select a house, for the purpose of holding court, as near as practicable to the county seat. The sheriff selected the Forrest house, and at that place the final judgment upon which the execution was issued was rendered. The court said, l.c. 269:

"* * * The correctness of the general proposition that when the record affirmatively shows that a judgment in a cause was pronounced at a time and place where the law did not authorize the holding of court, such judgment will be held to be a nullity, is unquestioned. There is no dispute in this case as to the power of the judge under the law to hold the court at the time it was held, but his power to hold it at the place where it was held is denied. The question is not free from doubt and difficulty, and has not before been directly presented to this court, nor is such a case as the facts before us disclose expressly provided for by statute. It is provided in Chap. 40 Wag. Stat. 394, that, when a new county is organized, as soon as convenient buildings can be had, or a court house and jail are erected at the established seat of justice, the courts of such county shall be held at such seat of justice; and until such convenient building can be had, or a court house and jail erected, such court shall be held at such places as the county tribunal transacting county business shall determine. When such tribunal determines the places at which such courts shall be held, and causes proclamation to be made at the court house door, that the courts thereafter will be held at such place, and if the place so selected shall not be the established seat of justice, the courts to be held in such county shall as soon as the court house and jail are erected, or sooner, if the tribunal transacting county business shall deem it expedient, be removed to and thereafter held at such established seat of justice. It is also provided in Art. 2 Chap. 40 Wag.

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Stat. 402, that when the seat of justice of any county shall be removed 'as soon as convenient buildings for the holding of courts, together with a good and sufficient jail, can be had at such new seat of justice, the county court shall notify the judges of the several courts holden in the county at the next term thereof, who shall cause the sheriff to make proclamation at the court house door, in term time, that such courts will thereafter be held at the place so selected.' It is manifest from the above provisions of the law that, as a condition precedent to the holding of courts at the seat of justice of a county, some place to hold them in must be provided by the county tribunal charged with that duty, and that, until such provision is made, the courts might legally be held at any other place or places in the county designated by the county tribunal. But it is said that the case at bar does not arise under the statute relating to the organization of new counties, nor to the removal of seats of justice, and is, therefore, not embraced within their provisions. While it is true, the case we are considering is not embraced within the letter of the act, it is by the spirit of it, that spirit being to authorize the county tribunals to provide a place other than the seat of justice until suitable buildings or a court house and jail can be provided, in which the courts can or may be held. The law does not require impossibilities. It imposed the duty on the judge of the circuit, which included Ozark, to hold his courts in that county at stated terms. This duty could not be performed by holding his courts in Gainesville, the seat of justice, because there was neither court house nor any other house in that town in which they could be held. It does not appear, except inferentially, that a court house had ever been erected in Gainesville, and the presumption might well be indulged, from the action of the county court in October, 1866, in ordering a suitable place to be selected and rented as near the county seat as practicable, in which to hold the courts of the county, that no court house had been provided or erected. The record shows that the county court did act in this matter, and

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directed the place to be selected by the sheriff in which to hold the courts of the county; that the place selected by him was approved by the court; and that the court, at which the judgment in question was rendered, was held at the place thus selected and approved. To hold that a judgment rendered at such terms was absolutely void would be to reverse the rule of presumption, and presume that jurisdiction of the person and subject matter having been acquired, everything was irregularly, instead of regularly, transacted.
* * *

For further discussion of the validity of proceedings of circuit court at places other than the courthouse, see State ex rel. Green v. James, 355 Mo. 223, 195 S.W. (2d) 669.

CONCLUSION

It is, therefore, the opinion of this office that the County Court of Dallas County may, by proper order, designate some other building within the seat of justice of Dallas County as the place to hold circuit court, and that prior to holding court at such new place the sheriff should make proclamation of the new place of holding court.

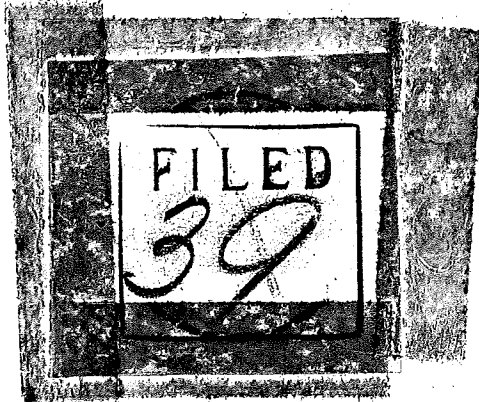
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON
Attorney General

PMcG:vlw

COUNTY COURTS: No authority to hold persons writing libelous articles in newspapers concerning the county court and its members, in contempt of court.



April 26, 1954

Honorable Rex A. Henson
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri

Dear Mr. Henson:

This will acknowledge receipt of your request for an opinion, which reads:

"The Presiding Judge of the County Court of this county has requested that I write you for an opinion as to the authority the County Court has to order a person or persons held for contempt of court.

"The local newspaper has printed some articles concerning the Court and its members which the members of the Court consider as libelous and they want an opinion from you as to the authority they might have in holding the person or persons who wrote the article in contempt of Court.

"Your assistance in this matter will be greatly appreciated."

County courts are created in this State by virtue of Section 7, Article VI, Constitution of Missouri and Sections 49.010 and 020, RSMo 1949. The general rule is that such courts have only authority and power as may be vested in them by the Constitution and laws of this State. In Jensen v. Wilson TP., Gentry County, 145 SW2d 372, 1.c. 374, the court said:

"* * * A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it

Honorable Rex A. Henson

must pursue its authority and act within the scope of its powers. State ex rel. Quincy, etc., Ry. Co. v. Harris, 96 Mo. 29, 8 S.W. 794.

A careful search of the statutes fails to disclose wherein the county court is specifically given authority to bring contempt proceedings. It may be possible that the General Assembly has not realized that since the county court is no longer a court of record as declared by the appellate court in this state, that it is no longer vested with statutory authority or any implied authority to hold anyone in contempt of court as provided for courts of record.

In Rippeto v. Thompson, 216 SW2d, 505, 1.c. 508, it was held that county courts under the Constitution of Missouri 1945, are no longer vested with judicial power, are not courts of record, and not courts of law but merely ministerial bodies managing the county's business. Likewise, In re City of Kinlock, 242 SW2d 59, 1.c. 62, the court again held that county courts are no longer courts of record; are not vested with judicial power.

Section 476.110 RSMo 1949, specifically provides that certain acts constitute contempt of court but only in a court of record. While we find no statutory authority for a county court holding anyone in contempt of court, the Legislature has made certain acts committed in such courts a misdemeanor. Under Section 50.160 RSMo 1949, the county court is required to audit, adjust and settle all accounts to which the county is a party. Furthermore, under this statute, the court may issue process for necessary parties and said statute makes it a misdemeanor for such persons failing to appear, refusing to answer questions, produce papers or refuse to be sworn. Said statute does at least aid to prevent certain abuses to the court. Furthermore, Section 49.210 RSMo 1949, vests in said court further authority to award process for all necessary persons, place them under oath or affirmation and examine them as to any controversy.

There is considerable authority for courts having inherent power to carry out statutory duties and provides that they may go so far as to hold one in contempt of court for interfering with the business of the court; however, all such authority seems to be vested only in courts of record and in judicial proceedings. See People v. Schwarz, 248 Pac. 990, 1.c. 993; Osborn v. Pardome, 244 SW(2d) 1005, 1.c. 1012; Zeitinger v. Mitchell, 244 SW(2d) 91, 1.c. 97.

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Finding no statutory authority for county courts holding anyone in contempt of court, the question is now presented whether county courts may have such power by reason of the common law. Under Section 1.010 RSMo 1949, the common law in force prior to the fourth year of the reign of James the 1st is still in force in this State so long as it is not in conflict with the Constitution of the United States, the State or any State law. However, Section 46, page 61, Vol. 17, C.J.S. lays down the general principle that the common law power to punish for contempt is only vested in courts of record.

In view of the fact that county courts are no longer courts of record and have no judicial authority, in the absence of any statutory authority for such county courts to hold such persons in contempt of court, we believe that such courts are without any authority to hold anyone in contempt of court.

CONCLUSION

Therefore, it is the opinion of this department that county courts, no longer being courts of record, are no longer vested with authority to hold persons in contempt of court and it follows that the county court cannot hold such persons who wrote the articles in question in contempt of court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

ARH:sm

PROSECUTING ATTORNEYS OF
THIRD CLASS COUNTIES:
REPRESENTING PERSONAL
CLIENT:

A prosecuting attorney of a third
class county may represent a defendant
in condemnation proceedings by a city
of the third class.

June 17, 1954



Hon. Albert L. Hencke
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Mr. Hencke:

On June 7, 1954, you requested our opinion as follows:

"I hereby request an opinion regarding the following: Is it inconsistent to the duties of Prosecuting Attorneys of Third Class Counties, that being Franklin County, to accept employment representing a client in condemnation proceedings against said client, said proceedings filed in behalf of a Third Class City within aforementioned County."

It is our view that it is not inconsistent to the duties of prosecuting attorneys of third class counties to accept employment representing a client in condemnation proceedings against the client brought by a city of the third class.

Section 56.070 V.A.M.S. defines generally the duties of a prosecuting attorney with reference to civil suits. Section 56.110 provides that if the prosecuting attorney is interested or has been employed as counsel in any case where such employment is inconsistent with the duties of his office the court having jurisdiction may appoint some other attorney to prosecute or defend the cause.

Honorable Albert L. Hencke

You do not advise us the precise nature of the condemnation suit instituted, or to be instituted, by the city of the third class. However, we assume that the condemnation suit contemplated falls within the provisions of Section 88.010 et seq. Section 88.013 provides that the attorney for a city, in the name of the city, shall apply to the circuit court of the county where said city is located, by petition, and praying for the appointment of commissioners to assess damages. We are unaware of any situation under this statute wherein the prosecuting attorney of the county would be required to officially associate himself with the city attorney in such an action. So far as we can determine there are no references in the provisions of the statutes which contemplate that either the state or county may be parties in the initiation of condemnation proceedings by a city.

Possibly a county might be named a party defendant in such a condemnation suit, and consequently the prosecuting attorney might be called upon to represent the county's interest. Even were this true it is our further opinion that it would not be inconsistent for the prosecuting attorney to represent a personal client as well as the county if they were both defendants in the condemnation suit and had common interests. See *Stone vs. Slattery's Administrator* 71 Mo. App. 442.

In connection with the foregoing we might further invite attention to Supreme Court Rule 4.06 which provides that the sole object of the rule against representation by an attorney of adverse interests is to prevent the harm that would logically follow, and, where the interests are not adverse the reason for the rule does not apply, and the lawyer may act with all propriety.

CONCLUSION

It is the opinion of this office that a prosecuting attorney of a third class county may accept employment representing a client in condemnation proceedings brought by a city of the third class against said client.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Ronald S. Reed.

Very truly yours,

JOHN M. DALTON
Attorney General

rsr/lt

SCHOOL BOARDS:
STATUTE OF LIMITATIONS:

School boards do not have discretion to waive the defense of the statute of limitations.



September 13, 1954

Honorable Rex A. Henson
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion of this office, wherein you ask:

"During the week of May 17, 1954, a school bond in the sum of \$500.00 on the consolidated school district at Qulin, Missouri, in Butler County, was presented to the school board for payment. The bond was dated May 25, 1923, and became due on February 1, 1942. According to the information I have, the bond was never presented for payment until the week of May 17, 1954. I am advised that this bond is genuine and was never paid.

"The members of the school board . . . would like your opinion as to whether or not the school board should pay this bond out of the funds of the school district or whether they should refuse payment under the statute of limitations. In other words, they would like to know if it is discretionary with the board on the question of whether or not they payan obligation of the school district on which the statute of limitations has run."

It appears that any action to collect on the bond in question would be covered by the general statute of limitations which bars such action in ten years after the right of action accrued. This

Honorable Rex A. Henson

is provided in Section 516.110 RSMo 1949. See Pullum v. Consolidated School District No. 5, Stoddard County, 357 Mo. 858, 211 SW2d 30.

An extensive search of Missouri authorities reveals no case covering this question; however, it appears well established in Missouri law that public funds are in the nature of trust funds, and that officers holding and disbursing such funds act in the capacity of trustees; that they act as insurers in holding such funds and may disburse them only as authorized by law. Unless the law specifically provides that such public funds shall be disbursed in the manner proposed, such public officials do not have the power to so disburse such funds. Thus in State v. Weatherby, 344 Mo. 848, 129 SW2d 847, Division 1 of the Supreme Court of Missouri said:

"The situation differs vastly from a controversy between private citizens involving the principle that one may do what he will with his own. Public officials are but the servants of the public. Public funds are but trust funds. Public officials performing a duty with respect thereto are not dealing with their own. All persons, State officials and employees included, are charged with knowledge of the laws enacted by the sovereign for the protection of its property and are required to take due notice thereof. A broad distinction exists between the acts of a public official and those of an agent of a citizen within the apparent scope of his authority. Public officials act in regard to public funds in a trust capacity. Their acts beyond the scope of their authority are, and are known to be, unauthorized, do not bind their principal, and their mistakes are their own and not the mistakes of the sovereign. * * * * *

The reasons underlying the rule permitting recovery of public moneys wrongfully disbursed to public officials applies with equal force to all citizens, and, with the added factors that public funds are trust funds and public officials are public servants acting in a restricted trust capacity,

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known to all, with respect to public funds, repels the reasons under which a recovery of payments made under a mistake of law is denied private individuals. * * *

In *City of Fayette v. Silvey*, 290 SW 1019, the Kansas City Court of Appeals held that a public official who held public funds was an insurer thereof; that he was subject to a stricter accountability than a bailee or a trustee, and that he was liable for the loss of funds even though such loss occurred without his fault and through no negligence on his part; and in *Kansas City v. Halvorson*, 352 Mo. 280, 177 SW2d 495, Division 2 of the Missouri Supreme Court held that unless the disbursal of public funds by a public official was specifically authorized by law, such disbursal was beyond the power of such public official and the moneys so disbursed could be recovered in a suit against the person who received the same.

Even though the person who receives public funds has rendered service or delivered materials as a *quid pro quo* therefor, such funds may be recovered by the state or its subdivisions if the disbursal of such funds was not specifically authorized by statute. See *Elkins-Swyers Office Equipment Co. v. Moniteau County*, 357 Mo. 448, 209 SW2d 127. In reaching this decision, Division 2 of the Missouri Supreme Court said, *l.c.* 209 SW2d 131:

"Public funds are trust funds and public officials act in a trust capacity with respect thereto, subject to all limitations of whatever nature upon their authority imposed by the public. All persons are charged with knowledge of the laws enacted by the sovereign for the protection of its property and are required to take due notice thereof."

Thus it appears that the funds in the hands of the board of education constitute moneys held in public trust and may be disbursed by the board only as specifically authorized by law. In your question, the board is not authorized to pay the bonds after the statute of limitations has run. On the contrary, the law provides that after the lapse of ten years, these moneys cannot be collected by the bond holder unless the statute of limitations has in some way been tolled.

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In the absence of Missouri cases on this specific problem, we look to the law of other states. While it is generally held that the state, that is the legislature acting for the state, may by a general statute waive the statutes of limitations that have already barred action by its citizens, it seems to be the general rule that governmental officials may not themselves waive such defense of limitations unless such action is specifically authorized by statute. Corpus Juris Secundum, Volume 53, page 960, Limitation of Action, Section 24, states this general rule as follows:

"In the absence of statutory authorities, however, a governmental official ordinarily lacks power to waive either general limitations, or those enacted specifically for the protection of the governmental body which he represents."

A very similar question was presented to the Supreme Court of Oklahoma in the case of Nordman v. School District No. 43 of Choctaw County, 121 Pac.2d, 290. In that case, suit was brought on a bond after the statute of limitations had run. The plaintiff secured a default judgment and later the board moved to set aside such default judgment on the ground that it was irregularly issued since the defense of the statute of limitations appeared upon the face of plaintiff's petition. The Supreme Court of Oklahoma held that the board was without power to waive the defense of the statute of limitations, and that, consequently, the default judgment could be set aside. In reaching this conclusion, the court said:

"A school district is a political subdivision of the state. Its powers, and those of its officers, are only such as are specifically granted by the Constitution and statutes, and such as are reasonably or necessarily incident to the specific grant. Our Constitution and statutes have carefully restricted the incurring of debt and the expenditure of the public funds. Prior decisions of this court are many and uniform to the effect that a claimant to public funds of a subdivision of the state must point to a statutory authority in support of the claim. The ultimate object of plaintiff's suit is to recover a part of the public funds of the defendant school district. Those funds are by

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law entrusted to the care of the directors of the school district under careful legal restrictions as to disposition thereof. The statute grants permission to sue the district, and section 101 O.S.1931, 12 Okl.St.Ann. Sec. 95, restricts the time in which suit may be brought. Nowhere in the statute has it been pointed out that there has been given authority to the director or officers of a school district to waive any provision of law, which waiver will operate directly to charge the district either with debt or liability or result in divesting it of any part of its public funds.

"It is generally true that a private person may voluntarily waive a substantial right and may, if he chooses, voluntarily dispose of his funds as he desires and at his discretion, but that rule does not apply to an agent unless he has been authorized so to do. The authority given the agents of the school district is statutory and therefore open for all to know, and in view of the well known fiscal policy of our laws, to the effect that the municipal agents may expend such funds, or incur financial liability, only as they are specifically or by reasonable implication so authorized, we must conclude that the school directors have been given no specific or implied authority to acknowledge by waiver, a debt which otherwise the school district is not unequivocally bound by law to pay.

"To hold otherwise than as here indicated would result in permitting school directors at their will to pay, or bring about the payment of certain claims, and to deny others of equal station, which would seem to result in unsound public policy and which nowhere appears to have been intended from the powers granted to the directors. Such powers might tend to induce fraud, collusion and oppression, and result in additional burdens upon taxpayers without their consent and in a manner not provided for by law."

Honorable Rex A. Henson

This case was followed in the later case of Lowden v. Stevens County Excise Board, 191 Okla. 5, 126 Pac.2d, 1023, where the Supreme Court of Oklahoma held that a judgment secured against a school board, when the claim was barred by the statute of limitations, was void since the school board did not have power to waive statute of limitations, and that such waiver could not be executed by the school board's failing to set up the defense of the statute of limitations, or by the school board's failure to plead to the defendant's cause of action, or by the school board's admitting the claim of plaintiff.

The same result concerning the power of public officials to waive the defense of the statute of limitations was reached by the Supreme Court of Utah in the case of Spring Canyon Coal Co. v. Industrial Commission of Utah, 58 Utah 608, 201 Pac. 173, 1.c. 178, where the court said:

"It is also elementary that, unless pleaded or relied on, the statute is waived. No doubt any person who has the right to interpose the statute of limitations may waive such right. To do that, however, ordinarily at least, implies that the right to waive is personal, and that in waiving it the person doing so acts in a personal capacity and in his own right. In this case, for example, the company, one of the plaintiffs, could waive the right to interpose the statute of limitations as a defense if it chose to do so. It could, however, only waive the right so far as it affected its own rights. Whether the State Insurance Fund could waive the benefit of the statute of limitations presents a different question. That fund is administered by the Industrial Commission as public officials, and hence is administered by them as trustees and not in their own right. The question therefore arises, May the statute of limitations be waived by those officials? It manifestly is their duty to administer the fund in accordance with law, and so as to treat all alike who have a right to participate in that fund. The people in their sovereign capacity have an interest in the State Insurance Fund, and they are entitled to have the same distributed to those only who are legally entitled thereto. To permit the Commission, or any other person having control of that fund, to waive the statute of limitations at

Honorable Rex A. Henson

will must, in the long run, result in injustice and favoritism, since the statute can be enforced as against A., B., and C., and as easily waived in favor of D., E., and F. A person or corporation distributing his or its own money may elect to waive the benefit of the statute of limitations in favor of A, while he or it may insist upon it as against B. without abusing any trust or disregarding a public duty. A public official may, however, not indulge in such a practice without abusing a trust and without bestowing a favor on one which he denies to another. In our judgment, where, as here, a fund is to be administered and distributed by public officials, it should be administered and distributed strictly in accordance with law, and to those only who are legally entitled thereto without favor to anyone. Under such circumstances the language of the Supreme Court of Mississippi in the case of *Trowbridge v. Schmidt*, 82 Miss. 475, 34 South. 84, is applicable. In referring to the duty of a municipal board to interpose the plea of the statute of limitations, the court, in the course of the opinion, said:

'It is indisputable that a municipal board cannot lawfully give away public money.'

"In the course of the opinion it is further said:

'It is the plain duty of a county or municipal board to plead the statute of limitations when it can under the facts. Such boards are the people's trustees.'

"If it is the duty of municipal or county officers to interpose the defense of the statute of limitations where public funds are in question, it certainly is the duty of a state official who is entrusted with

Honorable Rex A. Henson

public funds to do likewise. If he fails in doing so he must either disregard the statute of limitations entirely, and thus ignore the law, or he must practice favoritism by enforcing it as against one claimant while he waives it in favor of another. It needs no argument to show that such a practice would be intolerable."

This case was approved and followed as controlling authority by the Utah Supreme Court in the case of Taslich v. Industrial Commission of Utah, 71 Utah 33, 262 Pac. 281. Likewise, it is pointed out by the Utah Supreme Court in Odgen v. Industrial Commission, 92 Utah 423, 69 Pac.2d 261, that were a public official to waive the defense of the statute of limitations, he would be in violation of his public trust and such action would open the door to favoritism and discrimination. In this case, the Utah Supreme Court again approved the Spring Canyon Coal Co. case, quoted from and cited supra.

The Supreme Court of the State of Washington, in the case of Nagel v. Department of Labor and Industry, 189 Wash. 631, 66 Pac.2d 318, reached the same conclusion in considering the matter of the power of a public official to waive the defense of the statute of limitations when it said, l.c. 322:

"Generally speaking, no officer or agency of the state has the right to waive the defense of the statute of limitations."

Likewise, the Supreme Court of Mississippi, in the case of Trowbridge v. Schmidt, 82 Miss. 475, 34 SE 84, concluded that public officials, in this case the municipal board of the City of Vicksburg, did not have discretion to waive the defense of the statute of limitations, and that it was their duty to plead such statute whenever they can under the facts of the particular case.

While a contrary view has been reached by the Supreme Court of Michigan in the case of Moden v. Superintendent of the Poor of Van Buren County, 183 Mich. 120, 149 NW 1064, and by the Court of Civil Appeals of Texas in the case of Travis County v. Matthews, 235 SW2d 691, and Frost v. Fowlerton Consolidated School District No. 11, 111 SW2d 745, these decisions were reached primarily on the basis of matters of pleading and of preserving points for review by the

Honorable Rex A. Henson

appellate courts and do not represent a considered opinion of these courts based upon the public policy of their respective states as to the legality of a deliberate waiver of the statute of limitations by a public official when the question of paying out public funds is presented to him. For this reason, it is believed that these cases should not be controlling of the present question since no pleading or appellate review is here involved, and since it appears that public policy of Missouri, as expressed by our Supreme Court, is that public funds are trust funds and public officials holding and disbursing such funds are acting in a fiduciary capacity and have strict liability for such funds and may disburse them only when authorized specifically by statute.

CONCLUSION

It is, therefore, the conclusion of this office that the school board of the consolidated district at Qulin, Butler County, Missouri, does not have discretion to waive the statute of limitations and pay an obligation of the school district which is presently barred by said statute of limitations.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Very truly yours,

John M. Dalton
Attorney General

FLH:sm

SCHOOLS: Failure of board of directors of a consolidated school district to act upon a petition to dissolve the district does not invalidate their subsequent official actions, including the calling and holding of an election for a bond issue. When notices calling for a bond election state that the purpose of the election is to obtain a loan to erect a school building at a particular place, that it is necessary that upon an affirmative vote the building be located at the place indicated in the notice.

BONDS:

September 30, 1954

Honorable Albert L. Hencke
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Sir:

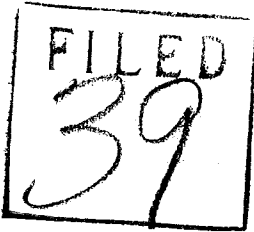
Your recent request for an official opinion reads as follows:

"I request an opinion on the following:
In 1950 five rural school districts voted to consolidate and form a Consolidated district. In 1952 a petition signed by twelve legal voters and taxpayers was filed with the new consolidated district requesting disorganization of the district. Five copies of the petition were filed. Since that date the board of the new consolidated district has refused to act upon the petition on the grounds that they need not do so. In 1953 the new consolidated district voted bonds for building a new school. This vote was the fifth election on same since the above mentioned petition to disorganize was filed. The bond issue further stated that the school was to be located on a particular piece of ground.

"(1) Was the bond issue legal with aforementioned petition pending?

"(2) Must the board erect the school on the property designated in said bond issue?

"(3) Is the board responsible for the money spent if the bond elections were not legal?"



Hon. Albert L. Hencke

It will be assumed that the real property referred to in the notice, upon which the building is to be built, is property already owned by the school district.

Your first question is: Was the bond issue legal with the afore-mentioned petition pending?

It would be our opinion that the bond election and issue were not illegal because of the fact that a petition to dissolve the consolidated district had been filed in 1952, and had never been acted upon. The statute followed then was no doubt what is now paragraph 1 of Section 165.310, MoRS, Cum. Supp., 1953, which reads:

"Town, city, consolidated or enlarged school district, dissolution, procedure--effect.--
1. Any town, city or consolidated school district heretofore organized under the laws of this state, or which may be hereafter organized, shall be privileged to disorganize or abolish such organization by a vote of the resident voters and taxpayers of such school district, first giving fifteen days' notice, which notice shall be signed by at least ten qualified resident voters and taxpayers of such town, city or consolidated school district; and there shall be five notices put up in five public places in said school district. Such notices shall recite therein that there will be a public meeting of the resident voters and taxpayers of said school district at the schoolhouse in said school district and at said meeting, if two thirds of the resident voters and taxpayers of such school district present and voting, shall vote to dissolve such town, city or consolidated school district, then from and after that date the said town, city or consolidated school district shall be dissolved, and the same territory included in said school district may be organized into a common school district under sections 165.163 to 165.260."

The above section does not state whether or not the notice which must be signed by at least ten resident taxpayers is to be filed with the school board, but the inference is that it should be, and you state that in your case this was done, and that five copies were filed with the board, also. It would appear, therefore, that the proper steps were taken to initiate a vote on

Hon. Albert L. Hencke

dissolution of the district. You state further that the matter rested at that point, since the board refused to take any action on the matter.

The statute above quoted would appear to impose the duty on the board, under the circumstances, to arrange for and to hold elections. In an opinion rendered by this department on July 20, 1936, to the Prosecuting Attorney of Barry County we so held; and likewise in an opinion rendered November 15, 1950, to Honorable J. R. Eiser, Prosecuting Attorney of Holt County, a copy of which is enclosed. This latter opinion held that the board should do this within a "reasonable" time after receipt of the petition. If this be the law and if the petition in your case complied with the law, then the board in your case could no doubt have been compelled by legal action to proceed to arrange for and hold the election. However, this was not done, and the question before us is simply whether the failure of the board to do what it should have done in this particular invalidated all of its subsequent actions, including calling an election for a bond issue. We do not believe that it would, since we are unable to find any law, statutory or case, which so holds. Furthermore, there cannot be any question about the fact that the district was not dissolved merely by the filing of the petition. In an opinion rendered by this department August 17, 1953, to Honorable William J. Cason, Prosecuting Attorney, Henry County, we held that a public meeting must be held before such dissolution could be effected, and the statute (Section 165.310, supra) holds that at least two-thirds of those present at such a public meeting must vote for dissolution before dissolution can be effected. Clearly this was not done, and so on the date that the bond election was called and held the district had a legal existence. Therefore, if the law was complied with in regard to the bond election, it would have been legal. It would not, as we stated above, have been invalidated by failure of the board to act upon the petition with them in 1952.

Your second question is: Must the board erect the school building on the property designated in said bond issue?

In regard to this, we direct attention to paragraph 1 of Section 165.040, MoRS, Cum. Supp., 1953, which reads:

"Building loans -- approved by voters -- bonds.-- 1. For the purpose of purchasing schoolhouse sites, erecting schoolhouses, library buildings and furnishing the same, and building additions to or repairing old buildings, the board of directors shall be

Hon. Albert L. Hencke

authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. The question of any such loan shall be decided at an annual school meeting or at a special election to be held for that purpose. Notice of such election shall be given at least fifteen days before the same shall be held, by at least five written or printed notices, posted in five public places in the school district where such election is to be held, stating the amount of the loan required, and for what purposes. It shall be the duty of the clerk to sign and post such notices. The qualified voters at such election shall vote by ballot. Such ballot shall contain a brief statement of the amount and purposes of the loan and the following:

| | |
|--------------------------|------------------|
| <input type="checkbox"/> | FOR THE LOAN |
| <input type="checkbox"/> | AGAINST THE LOAN |

Voters shall vote by placing a cross mark (x) in the square opposite their choice. A cross mark (x) in the square before the words 'FOR THE LOAN' shall be counted as a vote for the issuance of the bonds, and a cross mark (x) in the square before the words 'AGAINST THE LOAN' shall be counted as a vote against the issuance of the bonds. If two thirds of the votes cast on such proposition shall be cast for the loan, the board, subject to the restrictions of section 165.043, shall be vested with the power to borrow money, in the name of the district, to the amount and for the purpose specified in the notices as aforesaid, and to issue the bonds of the district in evidence thereof."

It will be noted from the above that the printed notices referred to shall state "the amount of the loan required, and for what purposes." In your case the notice, we assume, stated that the purpose of the loan was to erect a new school building at a particular place. We do not believe that the notice need to have specified the place where the building would be erected, but having done so, we believe that the building must be erected at such place, since it is conceivable that some voters at least who voted affirmatively would not have done so had they not felt assured that the building would be erected at a particular location. It may also be that the petitioners unnecessarily included the location in the notice only because they were aware

Hon. Albert L. Hencke

of the sentiment to have the building so located. In any event, the proposition voted on was, not simply to vote for a loan to erect a school building, but to erect a school building at a particular place, and this we believe must be observed.

On April 12, 1949, in an opinion to Honorable L. Clark McNeill, Prosecuting Attorney of Dent County, a copy of which is enclosed, we held that a school board may use the funds realized from a bond issue only for the purpose for which the electors of the school district voted the issue.

Your third question is: Is the board responsible for the money spent if the bond election were not legal?

Inasmuch as we have held in answer to your first question that the bond election was legal insofar as the filing of the petition for dissolution was concerned, there becomes no point in answering your third question.

CONCLUSION

It is the opinion of this department that the failure of the board of directors of a consolidated school district to act upon a petition to dissolve the district does not invalidate their subsequent official actions, including the calling and holding of an election for a bond issue.

It is the further opinion of this department that when the notices calling for a bond election state that the purpose of the election is to obtain a loan to erect a school building at a particular place that it is necessary that upon an affirmative vote the building be located at the place indicated in the notice.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

Encs. (3)

8-17-53 to Wm. J. Gason
11-15-50 to J. R. Eiser
4-12-49 to L. Clark McNeill

JOHN M. DALTON
Attorney General

HPW:DA

COUNTY HEALTH CENTER:
STATE TAX COMMISSION:
TAXATION:

State Tax Commission will assess the distributable property of public utilities and apportion to each county its share thereof. This assessment is the assessment upon which a tax levy upon said property, for support of a county health center must be based.



January 14, 1954

Honorable Andrew J. Higgins
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Sir:

By letter of December 23, 1953, you requested an official opinion as follows:

"On May 27, 1953, pursuant to the authority in Chapter 205, Laws of 1951, the voters of Platte County, Missouri, voted to establish and maintain a County Health Center. Said Health Center was immediately put into operation and has been in operation since the date of election.

"Such Center is financed by an annual tax of 10% on each \$100 of the assessed valuation in the county. In December, 1952 one of the utility corporations paid its taxes as apportioned to this county by the State Tax Commission with the exception of the Health Center levy. Again this year the same corporation has paid all of its taxes with the same exception. Another utility is also refusing to pay the Health Center levy this year. Many of the utility corporations have paid their levy in both years without question.

Honorable Andrew J. Higgins

"The basis for these refusals appears to be that these companies believe the tax to be illegal in that no valid assessment for the tax has been made or can be made by the State Tax Commission. It is my understanding that the Tax Commission has not made such an assessment for the benefit of Platte County, Missouri and further, that the Tax Commission feels they have no authority so to do, and of course, the tax cannot be collected without a valid assessment.

"1. Is there authority at present for the State Tax Commission to make an assessment against the distributable property of these utilities in this county for the benefit of the Health Center?

"2. If the State Tax Commission cannot make such an assessment, can it be done by any other body or officer?

"3. If there is no body or officer empowered to make such assessment, what steps are deemed necessary to rectify this situation in order that Health Centers may benefit from the distributable property of such utilities within this county?"

County health centers are authorized under the provisions of Section 205.010, et seq., Cumulative Supplement of 1951. Section 205.020(2), Cumulative Supplement of 1951 provides for the levy and collection of taxes to support a county health center as follows:

"2. If a two-thirds majority of the votes cast at such election on the proposition so submitted, shall vote in favor of such tax, the county court shall proceed to levy and collect such tax and deposit same in the county treasury to the credit of the health center fund and such fund shall be expended as hereinafter provided."

The State Tax Commission is given the exclusive power of original assessment against public utilities by Section 138.420, RSMo 1949, which reads in part as follows:

Honorable Andrew J. Higgins

"1. The commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms. * * * "

Public utilities are declared subject to taxation, and the manner of taxation thereof is provided by Section 153.030:

* * *

"1.* * * and all property, real and tangible personal, owned by telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies and express companies shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons.

"2. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, county boards of equalization and the state tax commission are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization and state tax commission have or may hereafter be empowered with, in assessing, equalizing, and adjusting the taxes on railroad property; * * * "

Since public utilities are to be taxed in the same manner as railroad companies, we turn to Chapter 151, RSMo 1949, and find that the State Tax Commission assesses property of railroad companies by authority of Section 151.060, RSMo 1949.

"1. The state tax commission shall assess, adjust and equalize the aggregate valuation of the property of each one of the railroad companies in this state specified in section 151.020. * * * "

Honorable Andrew J. Higgins

However, the State Tax Commission may assess only the distributable property of public utilities. State ex rel. v. Baker, 293 S.W. 399, State ex rel. v. Gehner, 286 S.W. 117.

The State Tax Commission, after assessing the total valuation of public utilities, must then apportion the value of such property, as required by Section 151.080, Cumulative Supplement, 1951.

"Said commission shall apportion the aggregate value of all property herein specified belonging to or under the control of each railroad company, to each county, municipal township, (etc.) * * *."

A county health center is supported by taxes raised from the taxable property of the entire county. The State Tax Commission will assess, and apportion to the county the county-wide value of public utilities therein. It only remains, then, for the county court to apply the tax rate to the assessed valuation as apportioned by the State Tax Commission. Having answered your first question in the affirmative, there is no need to discuss the two subsequent questions.

CONCLUSION

It is, therefore, the opinion of this office that the State Tax Commission will assess the distributable property of public utilities, and apportion to each county its share thereof. This assessment is the assessment upon which a tax levy upon said distributable property, for support of a county health center, must be based.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

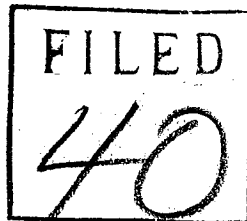
Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:vlw

TAXATION AND REVENUE:
CEMETERIES:

Real property owned by nonprofit cemetery association subject to taxation until dedicated to purposes of organization.



May 10, 1954

Honorable Andrew J. Higgins
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"The County Court of this County has requested that I write for your opinion on the question arising out of the following circumstances:

"In 1920 the Laurel Hills Cemetery Association was incorporated under the provisions of the Benevolent and Non-Profit Corporation Act. Said corporation was formed for the purpose of acquiring a cemetery and maintaining same. It is managed by a board of directors who serve without pay, receive no expenses and the members of said association receive no benefit therefrom.

"After incorporation the association took over the care and maintenance of a then existing cemetery, the lots of which had been platted and sold. The monies held by the association by way of the purchase price of said lots was invested in

Honorable Andrew J. Higgins

a real estate mortgage. In 1935 the mortgage became in default and the association foreclosed whereupon the association bought in the mortgage tract of 38 acres at the mortgage sale.

"Since the above foreclosure sale the association has held the 38 acres tract in its name and has rented it on a share tenant basis, receiving 50% of the profits therefrom. Such profits have been used in their entirety for maintenance of the aforesaid cemetery and for no other purposes.

"Since coming into the ownership of the 38 acres tract by the sale as aforesaid, the tract has been assessed to the cemetery association for tax purposes. For sometime this association has felt that they are entitled to an exemption from taxes as to the 38 acres tract under the provisions of Section 137.100 R.S. Mo. 1949.

"Question: Is the Laurel Hills Cemetery Association entitled to a tax exemption on a 38 acres tract held apart from the cemetery, the income from which is used solely for maintenance of the cemetery proper?"

Section 137.100, RSMo 1949, referred to in your letter of inquiry reads, in part, as follows:

"The following subjects shall be exempt from taxation for state, county or local purposes:

* * * * *

"(4) Nonprofit cemeteries; * * *."

This statutory provision is but declaratory of a constitutional grant of exemption extended to nonprofit

Honorable Andrew J. Higgins

cemeteries under the provisions of Section 6, Article X, of the Constitution of Missouri, 1945. This provision reads as follows:

"Exemptions from taxation.--All property, real and personal, of the state, counties and other political subdivisions and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

We assume from your letter of inquiry that the 38 acres of real property therein referred to have not been dedicated for cemetery use. This is apparent by virtue of the incorporation in your letter of inquiry of the statement that since acquisition the real property has been rented on a share tenant basis.

It is our thought that the question which you have proposed has been answered in an opinion of the Supreme Court of Missouri in the case of National Cemetery Association of Missouri, et al., v. Benson et al., reported, 129 S.W. (2d) 842. In the case mentioned the Supreme Court was considering a claim of exemption with respect to unplatted and undedicated real property owned by a cemetery association. The Court had this to say with respect to Section 6, Article X of the Constitution of Missouri, 1875, in so far as pertinent to our present inquiry was substantially the same as Section 6, Article X quoted supra:

"* * * An exemption from taxation can be sustained only when expressed in explicit terms and it cannot be extended beyond the plain meaning of those

Honorable Andrew J. Higgins

terms. The exemption intended here is to 'cemeteries' as such. The word 'cemeteries' is used independently of the balance of the sentence and the other words do not apply to or affect it. State ex rel. Mount Mora Cemetery Association v. Casey, 210 Mo. 235, 109 S.W. 1. The legislature has not expressed itself on this subject nor do we think that such is necessary before the exemption may be applied. We overrule respondents' contention that this provision is not self-executing. We hold that it is. Generally, constitutional provisions declaring that certain property shall be exempt are self-executing and need no legislation to enforce the exemption.

"We must determine therefore what is included under the word 'cemetery.' A cemetery has been defined to be: 'A place or ground set apart for the burial of the dead, orig. A Roman catacomb, later the consecrated yard of a church so used, now any burial ground, esp. on a large scale; a graveyard; a necropolis.' (Webster's New International Dictionary, 2d Ed.) 'A cemetery is a place set apart, either by municipal authority or private enterprise, for the interment of the dead.' (10 Amer. Juris., Cemeteries, Sec. 2, p. 487.) To invoke the exemption the property must have been 'set apart' for the burial of the dead. We are not concerned with that part of the land used for avenues, drives and walks which are appurtenances necessary to the use and enjoyment of the lot-owners."

We might add that in the case cited a further discussion appears with respect to determination of the precise point of time at which unplatted and undedicated real property becomes a "cemetery" within the meaning of the constitutional provisions, and we therefore direct your further attention thereto.

Honorable Andrew J. Higgins

CONCLUSION

In the premises we are of the opinion that unplatted and undedicated real property owned by a nonprofit cemetery is not exempt from ad valorem taxes for state, county and school purposes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

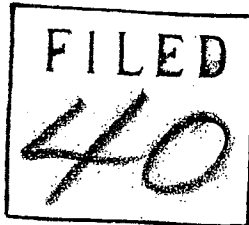
Very truly yours,

JOHN M. DALTON
Attorney General

WFB:vlw;irk

PLANNING AND ZONING:
CLASS THREE COUNTIES:
MEMBERSHIP:

A resident of Farley, Missouri, an incorporated town, is disqualified to act as a member or to perform service on the Platte County Zoning Commission.



July 15, 1954

Honorable Andrew J. Higgins
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Mr. Higgins:

This will acknowledge the receipt of your letter requesting an opinion from this office. This opinion request, omitting caption and signature, is as follows:

"The Platte County Zoning Commission requests that I secure the opinion of your office on the following question.

"Farley, Missouri is a town in Platte County, Missouri, which was incorporated in the early days of Platte County and for many years has been inactive in respect to performing municipal functions electing officers and in any way governing themselves as an incorporated city, town or village. The Platte County Zoning Commission is organized and exists under and by virtue of Chapter 64, R.S. Mo. 1949, providing for zoning of the unincorporated part of the county. The resident freeholder appointed to the commission from Lee township resides in the said town of Farley, Missouri.

"Question: Is a member of the Platte County Zoning Commission residing in the town of Farley aforesaid disqualified from service on the Platte County Zoning Commission?"

The County Planning, Zoning and Recreation statutes now in force in Missouri were contained in House Bill No. 465, passed by the 66th General Assembly (Laws of Missouri,

Honorable Andrew J. Higgins:

1951, page 406, Cumulative Supplement, 1953, page 79, Laws of Missouri, 1951, page 406.)

This Act is an amendment to Chapter 64, V.A.M.S. 1949.

The sections of said House Bill No. 465 providing for county planning, zoning and recreation are numbered Sections 1 to 16a, Laws of Missouri, 1951. These sections are numbered in Chapter 64, V.A.M.S. 1949, as so amended, (Cumulative Supplement, 1953, page 79), as Sections 64.510 to 64.690. We shall refer here to these sections as last above numbered.

We are particularly concerned here, in answering the question submitted, with the provisions of Sections 64.510, 64.520 and 64.530 (Cumulative Supplement, 1953, Laws of Missouri, 1951, page 406), V.A.M.S. 1949.

Said Section 64.510 provides that counties of the second and third classes may, by the action of the County Court, and after a vote of approval thereof, provided for in said Section 64.530, by the people of said county, provide for and carry out a planning and zoning plan for all areas of any such county adjoining and extending not more than forty (40) miles from the corporate limits of any city which now has or may hereafter have more than 70,000 inhabitants. This section also provides for the creation in each of such counties, upon the adoption of such county plan, of a County Planning Commission. Platte County, Missouri, is a county of the third class, having a population, according to the 1950 Federal Census of 14,973 inhabitants and an assessed valuation of property of \$25,585,811.00.

Section 64.520 provides for the appointment, residence qualifications, official identity and terms of office of members of such Commission. Said Section 64.520 reads as follows:

"County planning commission--members--term--chairman. -- Such county planning commission shall consist of one of the judges of the county court selected by the county court,

Honorable Andrew J. Higgins:

the county highway engineer, and one resident freeholder appointed by the county court from the unincorporated part of each township in the county, except that no such freeholder shall be appointed from a township in which there is no unincorporated area. Said township representatives are herein-after referred to as appointed members. The term of each appointed members shall be four years or until his successor takes office, except that the terms shall be overlapping and that the respective terms of the members first appointed may be less than four years. The terms of all other members shall be only for the duration of their tenure of official position. All members of the county planning commission shall serve as such without compensation. The planning commission shall elect its chairman who shall serve for one year. (L. 1951 p. 406 § 2)".

We believe your question must be answered by applying thereto the provisions of said Section 64.520, respecting the appointment of the members of the Commission, which state that the membership of the Commission shall include one resident freeholder, appointed by the County Court, from the unincorporated part of each township in the county. According to the statement in the letter requesting this opinion: "Farley, Missouri is a town in Platte County, Missouri, which was incorporated in the early days of Platte County and for many years has been inactive in respect to performing municipal functions electing officers and in any way governing themselves as an incorporated city, town or village."

It, therefore, appears that the town of Farley in Platte County, Missouri, is in fact and in law still an incorporated town in Lee Township in said county; that no person who is a resident of said town of Farley is eligible to be appointed from Lee Township in said county as a member of said Zoning Commission of said county; and that the appointment as a member of the Platte County Zoning Commission of a resident of said

Honorable Andrew J. Higgins:

town of Farley, if made, would be unlawful and ineffective, because in conflict with the provisions of said Section 64.520, which define the conditions constituting eligibility for membership in a Zoning Commission in any class two or class three county in this State.

It is said in the letter requesting an opinion on this question that the town of Farley for many years has been inactive in respect to performing municipal functions, electing officers and in any way governing themselves as an incorporated city, town or village. This situation does not alter the status of the town of Farley as an incorporated town. Once incorporated as a town, Farley, Missouri, still is an incorporated town under the law, unless and until the town shall be disincorporated as provided by the statutes of this State. Sections 80.570 and 80.580, V.A.M.S. 1949 (Sections 7295 and 7296, R.S. Mo. 1939) point out the proceedings to be taken to disincorporate a town such as the said town of Farley.

The Supreme Court of Missouri has construed these statutes in numerous decisions of the Court and has consistently held that a municipal corporation can be disincorporated only by following the procedure provided by statute. A recent decision by the Court so holding, is *In Re City of Kinloch*, 242 S.W. (2d) 59. The Court, l.c. 62, of the opinion, on this question, said:

"* * * A municipal corporation when once incorporated can only become disincorporated by resorting to the proceedings pointed out by statute. State ex rel. and to Use of Behrens v. Crismon, supra; State ex rel. Hambleton v. Town of Dexter, 89 Mo. 188, 1 S.W. 234."

It, therefore, appears clear that the town of Farley is an incorporated town in Lee Township, Platte County, Missouri, and that no resident of said town of Farley is eligible for appointment to membership or to act as a

Honorable Andrew J. Higgins:

member of the Platte County Planning and Zoning Commission from Lee Township in said county, because such person would not be appointed from an unincorporated part of such township in Platte County, as is required by the provisions of said Section 84.520 (Cumulative Supplement, 1953, page 80, Laws of Missouri, 1951, page 406) V.A.M.S. 1949.

CONCLUSION

Considering the premises, it is the opinion of this office that a member of the Platte County Zoning Commission residing in the incorporated town of Farley, Lee Township, Platte County, Missouri, is disqualified as a member and from service on the Platte County Zoning Commission.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Very truly yours,

JOHN M. DALTON
Attorney General

GWC:irk

COUNTY COURT:
ZONING COMMISSION:
PUBLIC HEARINGS:

Chapter 64, RSMo 1953 Cumulative Supplement requires a public hearing to be held in each township to be affected by any amendment to any zoning order, regulation etc., thereunder.



October 5, 1954

Honorable Andrew J. Higgins
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads in part as follows:

" * * * The zoning order for Platte County, Missouri, is adopted as a portion of the master plan of the County and it is the understanding of the County Court and Zoning Commission that the master plan can be adopted in the first instance or amended at a later date with only one hearing. Whereas, the zoning order, included in the master plan, required ten hearings i.e. one in each township in the County. It is now desired to amend a portion of the zoning order. The entire law governing zoning in Platte County is contained in Chapter 64, Laws of Missouri, 1951, Section 64.510 to 64.690, inclusive,

"Question: Can the zoning order or a portion thereof be amended upon the holding of one public hearing or does the law contemplate amendment only upon holding ten public hearings i.e. one in each township? * * *"

The 66th General Assembly of the State of Missouri enacted the first law authorizing county courts of second and third

Honorable Andrew J. Higgins

class to provide for county planning and zoning. (Session Laws Missouri, 1951, page 406-417, inclusive, now known as Chapter 64, Missouri Revised Statutes Cumulative Supplement, 1953.)

We are not herein passing upon the validity of the adoption of the zoning plan as part of the county master plan.

The question is whether only one public hearing shall be held prior to the adoption of an amendment to said zoning order, whether said commission or county court has the discretion to determine how many public hearings may be held or whether there should be a public hearing held in each township affected thereby. There are several established rules of statutory construction that may be invoked in determining the legislative intent in enacting a statute. The basic principle being to determine the lawmakers' intention, and if possible to effectuate that intention. Another well established rule is that in construing statutes which appear to be in conflict the court should reconcile them, if possible, with the general legislative purpose, *Laclede Gas Company v. City of St. Louis*, 253 S.W. (2d) 832, 363 Mo. 842; *Free v. Board of Trustees of Firemen's Retirement System of City of St. Louis*, 257 S.W. (2d) 685, 363 Mo. 1131 and *State ex rel. Smith v. Atterbury*, 270 S.W. (2d) 399, 1.c. 404.

Section 64.550, Missouri Revised Statutes Cumulative Supplement, 1953, authorizes the county court to adopt a master plan for counties of the second and third class. Under said statute it requires at least one public hearing, which should be held prior to any adoption, amendment or extension of any master plan. However, from the very wording of such statute it is apparent that if the county court deems it necessary it could hold more than one hearing.

Under Section 64.630, Missouri Revised Statutes Cumulative Supplement, 1953, it is provided that for purposes of Section 64.620, Missouri Revised Statutes Cumulative Supplement, 1953, unincorporated territory may be divided into districts as best suited to carry out the purposes of Sections 64.510 to 64.690, Missouri Revised Statutes Cumulative Supplement, 1953. We assume the latter part of your request relates to those statutes which deal particularly with the unincorporated territory being formed into districts.

Section 64.640, Missouri Revised Statutes Cumulative Supplement, 1953, prescribes the manner in which such regulations,

Honorable Andrew J. Higgins

restrictions and boundaries of such districts shall be determined, established and enforced and from time to time amended, and reads:

"The county court shall provide for the manner in which such regulations, restrictions and boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed within said unincorporated territory. In order to avail itself of the zoning powers conferred by sections 64.510 to 64.690, the county court shall request the county planning commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. If there be no county planning commission the county court shall appoint a county zoning commission whose personnel, length of terms and organization shall be the same as provided in section 64.520 for a county planning commission. Such commission shall make a preliminary report and a proposed zoning order and shall hold public hearings thereon, and shall afford persons interested an opportunity to be heard. A hearing shall be held in each township affected by the terms of such proposed order, public notice of which hearing shall be given in the same manner as provided for the hearing in section 64.550. * * *"
(Underscoring ours.)

Section 64.670, Missouri Revised Statutes Cumulative Supplement, 1953, deals specifically with amendments of regulations and districts created under said Chapter 64, Revised Statutes Cumulative Supplement, 1953, and reads:

"The regulations imposed and the districts created under authority of sections 64.510 to 64.690 may be amended from time to time by the county court by order after the order establishing the same has gone into effect but no such amendments shall be made by the county court except after recommendation of the county planning commission, or if there be no county planning commission, of the county zoning commission, after hearings

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thereon by such commission. Public notice of such hearings shall be given in the same manner as provided for the hearing in section 64.550. In case of written protest against any proposed change or amendment, signed and acknowledged by the owners of twenty per cent of the frontage within one thousand feet to the right or left of the frontage proposed to be changed, or by the owners of twenty per cent of the frontage directly opposite, or directly in the rear of the frontage proposed to be altered, or in cases where the land affected lies within one and one-half miles of the corporate limits of a municipality having in effect ordinances zoning property within the corporate limits of such municipality, made by resolution of the city council or board of trustees thereof, and filed with the county clerk, such amendment may not be passed except by the favorable vote of all members of the county court."

Section 64.640 supra, deals more particularly with the original adoption of a zoning plan, however, it is the one statute in said Chapter 64 that specifically mentions zoning order and your request deals with an amendment of a zoning order. In the first sentence of said statute it provides for amendments thereto, and further reads, in part, " * * * and from time to time amended * * *." Under Section 64.670, supra, relative to amendments to regulations it provides that this may be done only after hearings thereon. (Note this reference to hearings is plural and not singular.) Public notice of such hearings is to be given in the same manner as provided for the hearing under Section 64.550, Missouri Revised Statutes Cumulative Supplement, 1953, that merely requires notice in a newspaper and posting notices in four places and has nothing to do with the number of hearings required.

Apparently the legislative intent in enacting Section 64.670, supra, was that prior to adoption of any amendment to regulations imposed and districts created there must be hearings thereon.

The foregoing statutes are ambiguous with respect to the instant request as to how many public hearings should be heard in amending zoning orders.

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Therefore, considering either Section 64.640 or 64.670, or reading them together, we come to the same conclusion that prior to the adoption of any such amendment, whether a regulation or a zoning order there must be hearings thereon. Whether said commission can determine the actual number of hearings to be held or whether there must be one in each township affected thereby seems to be the real question.

In view of the fact the legislature has provided in the organization of such districts that there be a hearing in each township affected thereby, it would appear that each township could be just as materially affected by amendments thereto, as by said organization and a practical construction would be that prior to such amendments that public hearings should be held in each township affected thereby. In so holding all interested parties would be afforded a public hearing, and we believe the legislature had this intent when adopting such act. It could have specifically limited the public hearings to one or to those townships directly affected thereby or left the matter to the sole discretion of said commission or the county court, but this was not done.

CONCLUSION

Therefore, it is the opinion of this department that prior to the adoption of any amendment to such regulations or zoning orders of said commission, a hearing must be held in each township affected by such proposal.

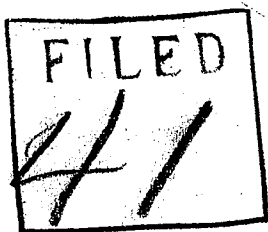
The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

ARH:vlw

COUNTY TREASURERS:
SCHOOL DISTRICTS:
BOARD OF EDUCATION:
SCHOOL MONEY:



(1) A school board is under an obligation to certify a levy within the limits of its authority to discharge the district's obligations or bonds issued by the school district. (2) The board of education of a school district may not issue a warrant if there be insufficient money in the proper fund for the payment of said warrant unless it can be reasonably anticipated that there will be sufficient income during that school year to pay the warrant. (3) It is not permissible for the county treasurer to pay warrants drawn upon the sinking fund and interest fund from the moneys collected and placed in the incidental fund.

Honorable Haskell Holman
State Auditor
Jefferson City, Missouri

July 14, 1954

Dear Mr. Holman:

By letter dated May 24, 1954, you requested an official opinion as follows:

"A school district voted and issued bonds for building purposes as provided by Section 165.040, R.S. Mo., 1949.

"The questions are:

"1. Is it mandatory for the board of education to set a levy for sinking and interest purposes in the estimates filed with the superintendent of schools as required under the provisions of Section 165.077, R.S. Mo., 1949, for the retirement of bonds and interest obligations?

"2. In the event the board of education failed to designate a levy for sinking and interest purposes in the estimate, but included such levy in the levy for incidental purposes, is it permissible for the board of education to issue warrants drawn upon the sinking and interest funds without providing a levy for such purposes? In connection therewith, we wish to call attention to the fact that said warrants were paid out of moneys collected from the levy for incidental purposes.

"3. If it is not permissible for the board of education to issue warrants

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drawn in such manner, is it permissible for the treasurer of the school district to pay said warrants from moneys collected for incidental purposes?

"4. If not, is the treasurer liable on his official bond for the payment of said warrants without having sufficient money in the proper fund from which to pay the warrants?"

In a subsequent letter you stated that the county involved is a fourth class county not having township organization, and that the school district is a consolidated district. You further stated that as of June 30, 1953, there was an overdraft in excess of \$4,000.00 in the sinking fund, and an overdraft in excess of \$500.00 in the interest fund.

The board of directors of school districts are authorized by Section 165.040, RSMo Cumulative Supplement, 1953, to borrow money to erect schoolhouses, etc., and to issue bonds for the payment of the money borrowed.

"1. For the purpose of purchasing schoolhouse sites, erecting schoolhouses, library buildings and furnishing the same, and building additions to or repairing old buildings, the board of directors shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. The question of any such loan shall be decided at an annual school meeting or at a special election to be held for that purpose.

* * * * *

If two thirds of the votes cast on such proposition shall be cast for the loan, the board, subject to the restrictions of section 165.043, shall be vested with the power to borrow money, in the name of the district, to the amount and for the purpose specified in the notices as aforesaid, and to issue the bonds of the district in evidence thereof.

"2. When bonds are voted under this section for the erection of one or more schoolhouses, to be erected on the same or different sites in common school districts, such bonds shall not be negotiated by such board until such

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bonds have been deposited with the county or township treasurer of the county or township in which such district shall be situated, and upon the order of such board, and the payment to the county or township treasurer of the amount agreed to be received for the same by such board from the purchasers of such bonds. The county or township treasurer shall countersign such bonds and deliver the same to the person or persons named by such board of directors; but no such bonds shall be sold for such an amount that the net proceeds, after deducting expenses and commissions from the same, shall be less than ninety-five cents on the dollar of the face value thereof, and all refunding bonds issued by such districts, to be exchanged for outstanding bonds of such district, or for the purpose of being sold to raise sufficient funds to pay any outstanding bonds thereof, shall not be exchanged, negotiated or sold by the board of directors of such districts except as above provided, and not until the purchase price thereof, or the bonds to be exchanged therefor, shall be turned over to the county or township treasurer; and such treasurer shall write or print the words 'Paid by refunding bonds' across the face of such bonds so received in exchange, and sign the same before delivering such refunding bonds to such board. The county or township treasurer and his sureties shall be responsible, on his official bond, for all moneys, bonds or securities received by him under this section."

Section 165.050, Cumulative Supplement, 1953, provides:

"The loan authorized by section 165.040, shall not be contracted for a longer period than twenty years, and the entire amount of said loan shall at no time exceed, including the present indebtedness of said district, in the aggregate ten per cent of the value of taxable tangible property therein, as shown by the last completed assessment for

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state and county purposes, the rate of interest to be agreed upon by the parties but in no case to exceed the highest legal rate allowed by contract; when effected, it shall be the duty of the directors to provide for the collection of an annual tax sufficient to pay the interest on said indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within the time said principal shall become due."

Boards of directors are authorized by Section 165.063, RSMo Cumulative Supplement, 1953, to provide for a tax levy for a sinking fund to retire such bonds.

"Boards of directors are hereby authorized to make an estimate for the levy of a tax, not to exceed four-fifths of one per cent, upon all the taxable property of the school district at its assessed valuation, said tax to be levied and collected in the same manner as other taxes for school purposes; and the money arising from said tax shall constitute a sinking fund, and shall be used only for the redemption of any outstanding bonds of such district; * * *."

Provision for a tax levy to pay interest on such bonds is made by Section 165.067, RSMo 1949.

"Boards of directors are hereby authorized to make an estimate for the levy of a tax upon all the taxable property of the school district at its assessed valuation, said tax to be levied and collected as other taxes for school purposes--said tax to be sufficient in amount to pay the annual interest on all bonds of their respective districts, and to pay for the printing or engraving of any bonds that may be issued by virtue of this chapter."

Boards of directors are required by Section 165.077, RSMo 1949, to make an estimate of money needed for the ensuing school year.

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"The board of directors of each school district shall, on or before the fifteenth day of May of each year, forward to the county superintendent of schools an estimate of the amount of money to be raised by taxation for the ensuing school year, and the rate required to produce said amount, specifying by funds the amount and rate necessary to sustain the school or schools of the district for the time required by law or authorized by the qualified voters of the district, to meet principal and interest payments on the bonded debt of the district, and to provide such funds as may have been ordered by the qualified voters of the district for other legitimate district purposes, including the purchase of school building sites, buying or erecting school buildings, repairing and furnishing such buildings, and providing foot bridges across running streams."

Section 165.110, RSMo Cumulative Supplement, 1953, creates certain funds for school moneys, and provides for the disbursement of such moneys.

"1. All school moneys received by a school district shall be disbursed only for the purposes for which they were levied, collected or received. There are hereby created the following funds for the accounting of all school moneys; Teachers' fund, incidental fund, free textbook fund, building fund, sinking fund, and interest fund. School district moneys shall be disbursed only through warrants drawn by order of the board of education. Each warrant shall show the legal identification of the district by name or by number as provided by law; shall specify the amount to be paid; to whom payment is made; from what fund; for what purpose; the date of the board order, and the number of the warrant. Each warrant must be signed by the president and the secretary or clerk; provided, however, that the board may by resolution direct that such

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signatures be affixed to such warrants in facsimile by a mechanical device adapted to such purpose which has been approved by the state auditor, state treasurer and state commissioner of education, or any two of them, sitting as a board for such purpose, as a device which provides adequate safeguards against the fraudulent or wrongful issuance of warrants. Warrants bearing such facsimile signatures placed thereon by such approved mechanical device shall be treated in all respects as if they bore the personal signatures of the president and the secretary or clerk of the board. No warrant shall be drawn for the payment of any school district indebtedness unless there is sufficient money in the treasury and in the proper fund for the payment of said indebtedness.

(Emphasis ours.)

"2. The warrants drawn shall be in the following forms:

* * * * *

"3. The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the teachers' fund, except as herein provided. Money apportioned by the state for transportation and money derived from taxation for incidental expenses shall be credited to the incidental fund. Money apportioned for free textbooks shall be credited to the free textbook fund. All money derived from taxation or received from the state for the erection of school buildings, from sale of school sites, school-house or school furniture, from insurance, from sale of bonds, shall be placed to the credit of the building fund. Money derived from taxation for the retirements of bonds

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shall be credited to the sinking fund. Money derived from taxation for the payment of interest on bonded indebtedness shall be credited to the interest fund. Receipts from delinquent taxes shall be allocated to the several funds on the same basis as receipts from current taxes, except that where the previous years' obligations of the district would be affected by such distribution, the delinquent taxes shall be distributed according to the tax levies made for the years in which the obligations were incurred. All refunds received shall be placed to the credit of the fund from which the original expenditures were made. Money donated to the school district shall be placed to the credit of the fund where it can be expended to meet the purpose for which it was donated and accepted. Money received from any other source whatsoever shall be placed to the credit of the fund or funds designated by the board.

"4. No treasurer shall honor any warrant unless it be in the proper form, and each and every warrant shall be paid from its appropriate fund, as provided by law. No partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant, provided that tuition shall be paid from either the teachers' or incidental funds if no part of the minimum guarantee is used for such purposes; provided, further, tuition and transportation costs shall be paid from either the teachers' or incidental funds when the school in any district has been closed on account of temporary combination or low average daily attendance, as provided by law; provided further, that the board of directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property; provided, further, that after all incidental obligations are paid, the board

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of directors shall have the power to transfer such portion of the balance remaining in the incidental fund to the teachers' fund as may be necessary for the total payment of all contracted obligations to teachers; provided further, that in the event of a balance remaining in the sinking or interest funds, after the total outstanding indebtedness for which said funds were levied is paid, the said board shall have the power to transfer such unexpended balances to the building fund; * * *

* * * * *

"6. No county, township, or school district treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; nor shall any portion of the funds mentioned in this section be applied in payment of any teacher's warrant issued prior to the distribution of such fund in accordance with section 161.040, RSMo."

The St. Louis Court of Appeals in State ex rel. Fredericktown School District No. 20 vs. Underwood School District No. 16 et al., 250 S.W. (2d) 843, made this statement concerning the duty of school boards to provide in their estimate for payment of the district's lawful obligations, l.c. 845, 846:

"There is no doubt of the duty of a school district to pay its lawful debts if it can do so by a levy within the limits fixed by law; and it is consequently mandatory that its officers shall certify a levy within such limits sufficient to discharge the district's obligations. In other words, in the performance of their duty the officers of the district have no discretion which can be rightfully claimed or exercised

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within the limits imposed by law upon the scope of their authority. Linn Consolidated High School Dist., v. Pointer's Creek Public School Dist., 356 Mo. 798, 203 S.W. 2d 721; State ex rel. Hufft v. Knight, Mo. App. 121 S.W. 2d 762. It follows, therefore, when such a debt has been reduced to judgment, that inasmuch as an execution may not run against the property of the district, the only remedy available to a judgment creditor to compel the performance of such duty is to sue out a writ of mandamus in a court of competent jurisdiction requiring the extension of a sufficient levy within the lawful limits to provide funds for the necessary purpose. State ex rel. Hufft v. Knight, supra; State ex rel. Edwards v. Wilcox, Mo. App., 21 S.W. 2d 930. However, there is always this to be observed--that the court will not compel the performance of an illegal act, so that the burden will be upon the relator to show that the rate which he would have the officers commanded to certify is not for any reason in excess of their authority. State ex rel. and to Use of Markwell v. Colt, Mo. App., 199 S.W. 2d 412; State ex rel. Hufft v. Knight supra."

We will not go into the manner of, or the prerequisites to, enforcement of such obligation, since we gather from your letter that you are primarily interested in the legality of payment of the principal, and interest, of the school bonds from the incidental fund.

In your question No. 2, you ask, "is it permissible for the board of education to issue warrants drawn upon the sinking and interest funds without providing a levy for such purposes? You stated that there is no money at all in the sinking fund, and interest fund, and that since no levy has been made, no income for these funds can be anticipated. If so, your question is answered by the last complete sentence of paragraph 1 of Section 165.110 (quoted in full above). That sentence reads as follows:

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"* * * No warrant shall be drawn for the payment of any school district indebtedness unless there is sufficient money in the treasury and in the proper fund for the payment of said indebtedness."

See the enclosed opinion rendered to Mr. George V. Farris on September 6, 1938 concerning encumbering anticipated revenue.

By your third question you ask if it is permissible for the treasurer to pay from the incidental fund a warrant drawn upon the sinking fund or interest fund. That question is answered by the first sentence of numbered paragraph 4 of Section 165.110, supra, That sentence reads as follows:

"4. No treasurer shall honor any warrant unless it be in the proper form, and each and every warrant shall be paid from its appropriate fund, as provided by law. * * *."

You then ask if the treasurer is liable on his official bond for the payment of the warrants without having sufficient money in the proper fund. That question is answered by the enclosed opinion rendered on January 11, 1935, to Honorable Charles A. Lee.

CONCLUSION

In the premises, therefore, it is the opinion of this office that: 1) A board of directors of a school district is under an obligation to certify a levy within the limits of its authority to discharge the district's obligations on bonds issued by the school district; 2) The board may not issue a warrant if there be insufficient money in the proper fund for the payment of said warrant unless it can be reasonably anticipated that there will be sufficient income during that school year to pay the warrant; 3) It is not permissible for the county treasurer to pay warrants drawn upon the sinking fund and interest fund from money collected and placed in the incidental fund.

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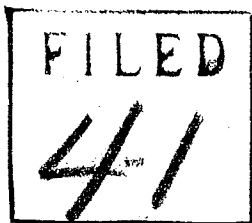
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:lvd:irk

OFFICERS:
STATE AUDITOR'S DUTY IN
APPROVING DEPOSITARIES
FOR STATE FUNDS:



State Auditor's duty in giving approval of depositaries for state funds, selected by State Treasurer under Sec. 30.240, RSMo 1949, requires previous personal investigation of facts, exercise of judgment and discretion, and cannot be delegated to Auditor's chief clerk. After Auditor has investigated facts, exercised personal discretion and judgment, he may delegate duty of affixing his signature to written instrument evidencing his approval, to chief clerk.

July 19, 1954

Honorable Haskell Holman
State Auditor
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your recent request for an official opinion, which reads in part as follows:

"Is the Chief Clerk in the Office of the State Auditor permitted to sign deposit approvals for the State Auditor?"

Does this question inquire whether the Chief clerk of the State Auditor can legally sign the Auditor's name to a written instrument evidencing the Auditor's approval of the depositaries for state funds, that is, does the inquiry refer only to the affixing of the signature to such document, or does it inquire whether the chief clerk can legally perform the Auditor's duty in investigating the facts, in exercising discretion and judgment and in finally arriving at a conclusion that such depositaries are proper ones, and then affixing the Auditor's signature to a written instrument showing the latter's approval of such depositaries? Because we are not sure of the exact nature of the question presented, we find it necessary to discuss and answer it in the alternative.

Section 30.240, RSMo 1949, provides how state moneys shall be kept and deposited, and the Auditor's duty in approving depositaries for such funds. Said Section reads as follows:

"All moneys now belonging to or that may at any time hereafter belong to the state, that is now in the state treasury or that hereafter may be required by law to be paid into the treasury for any purpose whatever, shall immediately on receipt thereof be deposited by the treasurer to the credit of the state, for the benefit of the fund to which

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such moneys respectively belong, in such banks, bank or banking institutions in this state as he may from time to time, with the approval of the governor and state auditor, select. The said bank, banks or banking institutions so designated shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping and payment of such deposits as provided in this act. Such bank, banks or banking institutions shall pay a bonus for the use of such deposits, not less than the bonus paid by other banks for similar deposits and the same together with the interest and profits as may accrue thereon, shall be disbursed by said treasurer for the purposes of the state according to law upon warrants signed by the state auditor and not otherwise; provided, however, that if, at the time when a selection of depositaries is made in accordance with the provisions of this chapter, it shall be unlawful for banks or banking institutions to pay interest upon deposits, the treasurer, with the approval of the governor, and the state auditor shall select as depositaries of state moneys for such period not exceeding four years as may be agreed upon with such depositary or depositaries, such banks or banking institutions as in their judgment would constitute the best, safest and most convenient depositaries, without requiring the payment of any bonus or interest therefor; provided further, that in regard to the selection of depositaries, for the safekeeping and payment of said deposits of state moneys that are in the state treasury, it shall be the duty of the state treasurer to divide the money into such amounts as he may designate and to select as a depositary or depositaries for state funds, which in his judgment, will be safe banking institutions for the protection of state funds, and after the selection of such banking institutions shall be approved by the governor and the state auditor, said depositaries selected shall put up for the security of funds sufficient securities of the kind and character as provided in section 30.270 at least equal in market value to one hundred and ten per cent of the amount of funds in possession of such depositaries, less five thousand dollars where the depositaries are insured by the Federal

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Deposit Insurance Corporation, and after having entered into a contract with such depositaries as provided in this act, then the state treasurer may award such sum as he may designate to each such depositary."

(Emphasis ours)

When we consider the "approval" of the depositaries by the State Auditor as referred to in above-quoted Section, other questions naturally present themselves to us such as:

- (1) What is the statutory meaning of "approval"?
- (2) Does the term refer to a discretionary or ministerial duty of the Auditor?
- (3) Can such duty be delegated to the chief clerk, who, after performing same can or cannot sign the Auditor's name to approvals of the depositaries?

We feel that these are basic preliminary questions and have such a direct bearing upon the one of the opinion request that they must be first answered before a correct answer can be given to the one referred to in the opinion request.

It is noted that neither the above-quoted Section nor any others define the word "approval" nor are there any details given in said Section showing the statutory duties of the Auditor in approving state depositaries. From the context of the statute quoted, it appears that the word is used in its common or ordinary sense, as there is no indication that it was to be given a technical meaning.

Webster's New International Dictionary defines the word "approval" as:

- "1. Act of approving; approbation; sanction.
- "2. Specif., examination to determine suitability for acceptance; as, goods sent on approval, that is, subject to a prospective purchaser's decision to accept them or to refuse them by returning within a specified time."

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From the dictionary definition of the word "approval", and also reference to the word in Section 30.240, supra, it appears that the Auditor is required to do something more than to merely indicate his agreement or acquiescence in the act of the State Treasurer in the latter's selection of banking institutions in which state funds are to be deposited. It is obvious that the statute requires the State Auditor to make some investigation of the facts regarding the financial standing, security, and suitability of the financial institutions before giving his approval of said institutions. The statute fails to provide a method or procedure for the Auditor to follow in such instances, and he has been left free to choose any such method of procedure he thinks best to follow under the circumstances, and which will satisfy him that the depositaries selected are proper ones for state funds.

The duty calls for the exercise of discretion and judgment by the Auditor and is one, in our opinion, which the lawmakers must have considered to be a very important one to be performed personally by the Auditor. It is our further opinion that if the lawmakers had believed it to be one of less importance, then they undoubtedly would have provided either specifically by the language used or that from which it might necessarily be implied that said duty could just as well be performed by others. Since this is not true, we must conclude that the legislative intent was that such duty was to be performed only by the Auditor.

It might be contended that since the chief clerk is required by statute to be competent to perform the duties of the State Auditor, that the chief clerk could approve the depositaries and sign the Auditor's name to depositary approvals, and that his action in so doing would be as legally binding as if the Auditor had performed said duty personally. Section 29.040, RSMo 1949, provides for the appointment of a chief clerk by the State Auditor and said Section reads as follows:

"The state auditor shall have the power to appoint a chief clerk who shall be thoroughly competent to perform all the duties prescribed by law to be performed by the state auditor. Such appointment, with the oath of office endorsed thereon, shall be filed in the office of the secretary of state before such chief clerk enters upon his duties. Such chief

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clerk, when appointed, may perform the duties of the office, but the state auditor and his sureties on his official bond, shall be liable for the official acts, misfeasance or defalcation of such chief clerk."

The only trouble with the possible contention mentioned above is that it ignores the legislative intent shown by Section 30.240, supra, that the State Auditor is to personally perform the duties referred to, and as we have tried to point out in our previous discussion.

Said duty could not be delegated to the chief clerk for the further reason that it requires the personal discretion and judgment of the Auditor, and the general rule is that duties of this nature of a public officer cannot be delegated to another. Said general rule has been stated in Volume 67, C.J.S., page 373 and reads as follows:

"In the absence of statutory authority a public officer cannot delegate his powers, even with the approval of a court. An officer, to whom a power of discretion is intrusted, cannot delegate the exercise thereof except as prescribed by statute. He may, however, delegate the performance of a ministerial act, as where, after the exercise of discretion, he delegates to another the performance of a ministerial act to evidence the result of his own act of discretion."

Again in the case of State ex rel. vs Reber, 226 Mo. 229, it was held that the duties of the President of the Board of Public Improvements of the City of St. Louis were of two kinds, namely, discretionary and ministerial. Duties of the first kind could not be delegated to another, while those of the latter kind could be delegated to another. It was also held in said case that tax bills required to be signed by the President and City Comptroller, but which were signed by a clerk in the President's office for the President, were as binding as if they had been actually signed by the President. At l.c. 234 and 237 the court said:

"As has been said already the duties of the president of the board of public improvements are of two kinds, the one is such as

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requires the exercise of discretion and judgment, involving often scientific and technical knowledge, the other requires the performance of mere ministerial or clerical work. The duties first mentioned cannot be delegated, those of the ministerial kind may be delegated with proper care."

* * * * *

"* * * An officer to whom a discretion is entrusted by law cannot delegate to another the exercise of that discretion, but after he has himself exercised the discretion he may, under proper conditions, delegate to another the performance of a ministerial act to evidence the result of his own exercise of the discretion. The clerk cannot pronounce judgment, but he may under direction of the judge make the record evidence of it. In *Porter v. Paving Co.*, 214 Mo. 1, it was held that the signature of the mayor, which the law required to be subscribed to an ordinance to show that it was approved by him, might under the mayor's direction be written by his secretary. We do not mean to say that an officer to whom the performance of even ministerial work is personally entrusted may, under all circumstances, delegate to another the performance of that duty, but we are aiming to draw the distinction in that particular between an official act requiring the exercise of personal discretion or judgment and a mere ministerial act which requires the exercise of no discretion, and to say that whilst the one cannot be delegated the other under certain circumstances may be.

"In the case before us we hold that the acts of signing the names of the president of the board of public improvements and the controller are ministerial acts and may under proper conditions be delegated, and we hold that the circumstances of this case render it proper that these officers, with the approval

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of the municipal assembly, shown by the ordinances in question, should delegate the authority to sign their names as has been done to these special tax-bills, and we hold that ordinances 24526 and 24527 are valid, and that the bills so signed are as valid as if they had been signed by the president of the board of public improvements by his own hand and countersigned by the comptroller with his own hand."

In view of the foregoing, it is our thought that the provisions of Section 30.240, supra, clearly shows the legislative intent to be that the Auditor shall personally examine the facts relative to the financial standing, security, and general suitability of financial institutions selected by the State Treasurer as depositaries for state funds before giving his approval of such depositaries. Such duties require the exercise of the Auditor's discretion and judgment, and he cannot legally delegate the performance of such duties to his chief clerk. However, once the duty has been personally performed by him, he may delegate the ministerial duty of signing his name to a written instrument evidencing his approval of such state depositaries, and the written approval to which the Auditor's name has been signed by the chief clerk in this manner will be as legally effective as if it had been signed by the Auditor personally.

CONCLUSION

It is the opinion of this Department that the duty of the State Auditor in giving his approval of the depositaries for state funds selected by the State Treasurer under the provisions of Section 30.240, RSMo 1949, requires the previous, personal investigation of the facts involved, the exercise of discretion and judgment, and he cannot delegate the performance of said duty to his chief clerk. However, after the Auditor has made the necessary investigation, and has exercised his personal discretion and judgment, and is convinced that the depositaries selected are proper ones, he may delegate the duty of affixing his signature to a written instrument evidencing his approval of said depositaries, to his chief clerk.

This opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC:lvd

REAL ESTATE COMMISSION: : Missouri Real Estate Commission may
EXAMINATIONS: : designate suitable persons to dis-
: tribute examination papers and super-
: vise the taking of written examinations
: by applicants for real estate salesman
: license; said examination having been
: prepared, and to be graded, by the said Commission.
.....

August 11, 1954

Honorable J. W. Hobbs
Secretary
Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri

Dear Sir:

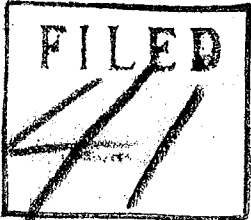
You have requested an official opinion as follows:

"Can the members of the Missouri Real Estate Commission designate any person they may desire to give a salesman's examination as outlined in Section 7 and the other Sections of the Missouri Real Estate License Law?

"The grading of the examination papers would not be done by the person giving the examination, the papers would be graded by the office of the Missouri Real Estate Commission and all factors determined in regard to the applicant and the examination by the office of the Missouri Real Estate Commission."

The Missouri Real Estate Commission is created by Section 339.120, RSMo 1949. That section permits the Commission to employ a secretary and other necessary employees as follows:

"* * * The commission shall employ a secretary and such other employees as it shall deem necessary to discharge the duties imposed by the provisions of this chapter, and shall outline their duties and fix their



Honorable J. W. Hobbs:

compensation, and shall require such surety bonds as deemed necessary. The salary of the secretary shall not exceed three thousand six hundred collars per annum, and no other employee shall receive a greater salary than is paid in other state departments for work of similar character. The secretary and all employees shall serve at the pleasure of the commission."

Section 339.040, RSMo 1949, makes the following provision:

"A license shall be granted only to persons who bear and to corporations or associations whose officers bear, a good reputation for honesty, integrity, fair dealing, and who are competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests of persons whom they represent; and in order to determine the applicant's qualification to receive a license under this chapter, the commission shall hold oral or written examinations, at such time and place as the commission may determine."

Your letter indicates that the Commission will prepare written examinations to be given to salesmen, grade the examination papers, and determine whether the applicant has passed the examination, but that you wish to know whether persons other than the Commissioners can be designated to distribute the examination papers to the applicants, and supervise the taking of the examination. The Commission cannot, of course, abdicate its responsibility to hold oral or written examinations. However, we perceive no reason why persons other than members of the Commission cannot supervise the examinations in the manner above stated if such persons are trustworthy, and qualified to discharge their duties. The power given to the Commission to hire employees indicates that the Legislature did not contemplate that the Commission would discharge by their own hand all of the routine ministerial duties imposed upon them.

Honorable J. W. Hobbs:

CONCLUSION

It is, therefore, the opinion of this office that the Missouri Real Estate Commission may designate suitable persons to distribute examination papers and supervise the taking of written examinations by applicants for real estate salesman license; said examination having been prepared, and to be graded, by the said Commission.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

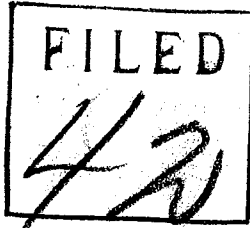
Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:lvd:irk

CRIMINAL LAW:
MAGISTRATE COURTS:

Form of recognizance of defendant for
appearance at trial.



April 14, 1954

Honorable Charles J. Hoover
Prosecuting Attorney
Grundy County
Trenton, Missouri

Dear Sir:

Reference is made to your request for an official
opinion of this department reading in part as follows:

"I would very much appreciate an official opinion answering the two questions hereinafter set forth, relative to a proper and legal appearance bond for a defendant who is brought before a Magistrate in answer to a misdemeanor charge filed by the Prosecuting Attorney. The approximate procedure is that defendant is brought before the Magistrate where the information is read to him and he is advised of his constitutional rights. He then enters a plea of not guilty, demands a trial by a jury (and in most instances makes it known to the Court that he desires time to prepare for trial) and asks that the cause be continued, and that a future trial date be fixed or set. He also asks that the amount of his bond be determined and fixed for appearance on the day set for trial. Under these circumstances, the amount of the bond is fixed at \$1,000.00,

Honorable Charles J. Hoover

and he desires to proceed to give bond for his appearance on the date set for trial.

"Under the brief, assumed facts outlined above, may I please have your opinion

"First as to what kind of bond defendant in the first instance should give and what should be the conditions and terms of the bond.

"Second, what constitutional provisions, statutes, and rules of the Supreme Court govern the giving of a proper bond."

In view of the conclusion which we have reached we have grouped your questions for answering. We believe that the answer to your second question will appear in the course of the opinion.

The procedure before magistrates in connection with the prosecution of misdemeanors appears as Chapter 543, RSMo 1949. As applicable with particularity to your question we direct your attention to Section 543.080, RSMo 1949, reading as follows:

"When the defendant shall be brought before the magistrate, or shall be held in custody, charged by information with any misdemeanor, it shall be the duty of the magistrate, unless a continuance be granted, forthwith to hear the case as herein provided." (Emphasis ours.)

Your attention is further directed to Rule 22.01 of the Supreme Court which is substantially the same as the statute quoted. Your further attention is directed to Section 543.120, RSMo 1949, reading as follows:

"Upon good cause the magistrate may postpone the trial of a cause to a day certain; in which case he shall require the defendant to enter into a recognizance with sufficient security, conditioned that

Honorable Charles J. Hoover

he will appear before the magistrate at the time and place appointed then and there to answer the charge alleged against him in the information and not to depart without leave."

This section is similar to Rule No. 22.02 of the Supreme Court which we quote at length for reasons appearing infra.

"Upon good cause shown the magistrate may postpone the trial of a cause to a day certain; in which case, if the defendant has not previously been admitted to bail, he shall require the defendant to enter into a bail bond with sufficient security, conditioned that he will appear before the magistrate at the time and place appointed, then and there to answer the charge alleged against him in the information and not to depart without leave." (Emphasis ours)

We believe that the emphasized portion of the rule discloses clearly that the request of a defendant for a postponement after arraignment on a misdemeanor is a "continuance" within the meaning of the statutes relating to procedure before magistrates in such cases. In these circumstances we think that the answer to your question with respect to the form, conditions and terms of bonds to be given is found in the provisions of Section 543.150, RSMo 1949, which reads as follows:

"When a continuance is granted, the recognizance required of the defendant may be in the following form:

"We, A B, as principal, and E F and G H, as sureties, acknowledge ourselves to owe and be indebted to the state of Missouri, in the sum of _____ dollars, to be void upon this condition: That said A B shall personally appear before O K, a magistrate within and for the county of _____, and state of Missouri, at his office, on the _____ day of _____ 19 ____, at _____ o'clock ____ M.,

Honorable Charles J. Hoover

then and there to answer to an information for _____ (here state the offense), and not to depart without leave; otherwise to remain in force.

Witness our hands and seals, this ____ day of _____, 19 ____

Principal

Sureties

Taken and acknowledged before me this ____ day of _____, 19 ____

Magistrate."

We note that the statutory form does not include a signature line for the person designated as "principal." However, since the statute is directory we treat this omission as a mere oversight particularly in view of the fact that the "principal" is referred to in the body of the recognizance.

CONCLUSION

In the premises we are of the opinion that a defendant who has requested the postponement of the time of his trial upon a misdemeanor charge in magistrate court must enter into the form of recognizance provided by Section 543.150, RSMo 1949, or else stand committed to custody until the time of trial.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

**ELECTIONS:
CLAY COUNTY BOARD OF
ELECTION COMMISSIONERS:**

A circuit court may not order a board of election commissioners to register or reinstate an elector, unless said appeal to the circuit court is taken within two days after the elector has been denied registration or his name has been stricken from the register by said board, but no time is fixed within which the circuit court is required to make its order to the board; no provision is made by law whereby a tie vote by the members of the election board may be decided. In the case of a canvass of voters by mail the return of the postal card sent out may be made in any manner which the elector sees fit to employ, including the return of the card to the board by a candidate in a pending election.

August 20, 1954

Board of Election Commissioners
County Courthouse
Liberty, Missouri

Attention Alta V. Horton, Secretary

Gentlemen:



Your recent request for an official opinion reads as follows:

"I will appreciate an opinion from you for the guidance of our board to the following questions: 1st - in view of sec. 119.280, paragraph 5, wherein the act states 'no such registration of any voters shall be permitted later than 5 weeks before a general or primary election or sooner than 15 days after an election in counties included in this chapter, and transfers of registration or reinstatement of voters shall not be permitted later than 21 days before any such election.' And further in view of section 119.360 provided that an applicant who has been denied registration may appeal to the circuit court and secure an order for registration provided further 'that said appeal to the circuit court must be taken within 2 days after said person has been denied registration or his name stricken from the register by said board'. In view of this, may the circuit court order the board to register or reinstate a voter other than within 2 days after said person has been denied registration or his name stricken from the register by said board?

"Second - When the Election board is divided two and two on any proposition may anyone else, including a circuit judge, decide the issue?

"Third - Section 119.340 provides for canvass of voters by mail, wherein a double postal card is used. Does this section impose the duty upon the individual

Board of Election Commissioners

receiving same to return the attached card themselves or would it be permissible for anyone, candidates included, to collect several of these cards and bring them into the office, where signatures would be compared.

"The Board is interested in creating good will but we are doubly interested in following the law."

Your first question is: May the circuit court order the board to register or reinstate a voter other than within two days after said person has been denied registration or his name stricken from the register by said board?

In regard to the above, we direct attention to the following portion of Section 17, Laws Mo. 1953, p. 696 et seq., which reads:

"* * * In all cases where any person is denied registration who makes application to register within the time and at the place fixed by this act, or if his or her name has been stricken from the register by the board of election commissioners, an appeal shall be allowed to the circuit court. No formal pleading shall be required, but it shall be sufficient for such person to present to the court an application verified by affidavit setting out that he or she has been denied the right to register by said board, or that his or her name has been stricken from the register, and the date of same, as the case may be, and such other information showing his or her qualifications as a voter in the precinct in which he or she claims a right to register. Said application shall first be presented to the board and shall contain a statement by said board or any member thereof, showing the reasons why said person was denied registration or his name stricken from the register. PROVIDED FURTHER, that said appeal to the circuit court must be taken within two days after said person has been denied registration or his name stricken from the register by said board. The court shall hear such application forthwith. Evidence may be introduced for and against said application. Each case shall be disposed of forthwith and the clerk of said court shall enter upon his records the disposition of said application. In the event the court shall sustain said application, the court shall forthwith notify the board of its action, and the board shall cause the applicant's name to be placed in the proper register and note the fact that

Board of Election Commissioners

said name was placed there by order of the court. No person whose name is admitted to the registry by order of the circuit court shall be protected by such order in case he shall be challenged or prosecuted for false registration or false voting." (Emphasis ours.)

It will be noted that the provision of the law on this matter is that the appeal to the circuit court must be taken within two days after the elector has been denied registration or after his name has been stricken from the register. The section continues with the statement that the court shall hear such application forthwith, but no time is fixed within which the order of the circuit court on the matter shall be delivered to the board. In view of this situation, our answer to your first question is that the circuit court may order the board to register or reinstate a voter at a time greater than two days after the said voter has been denied registration, or his name has been stricken from the register.

Your second question is: When the election board is divided two and two on any proposition, may anyone else, including a circuit judge, decide the issue?

In the absence of any authority vested in anyone not a member of the board, to vote on matters coming before the board, our answer to this question is likewise in the negative.

Your third question is: Does this section (119.340) impose the duty upon the individual, receiving a double postal card in a canvass by mail, to return the attached card themselves, or is it permissible for anyone, candidates included, to collect these cards and bring them to the office of the board?

In this regard paragraph 6, of Section 15, Laws Mo. 1953, page 693, reads:

"The board of election commissioners may conduct such canvass by mail, by forwarding through the United States mail notice to all registered voters to advise the board by return card, postage prepaid and attached to said notice, whether or not such voters then maintain their voting residences at the places designated in the registration records, and said board of election commissioners may require such voter to notify said board, by returning said attached card, duly executed by such voter, within a time designated by the board, of the fact that he or she still maintains his or her voting residence at the place designated on the registration records, and such other facts as may be lawfully herein required by said board, and upon the failure of said voter to

Board of Election Commissioners

return said attached card with the requested facts furnished and duly executed by the voter to the office of the board of election commissioners within such reasonable time as may be designated by the board, the board of election commissioners shall be, and hereby is, authorized to strike the name of said voter from the registration list and records, and such voter shall not be permitted to vote unless he or she shall first have been re-registered and reinstated, as in this act provided."

It will be noted that the above imposes upon the elector receiving the card the duty to "advise the board by returning the card, postage prepaid.* * *" Certainly this method of notifying the board by mail is not exclusive. If the elector took the card and handed it to a member of the board no objection could be made. If the elector procured someone to take it to the board for him, or allowed someone to do so, upon the solicitation of such person who, either through personal interest or a desire to aid in getting a full expression of public opinion in the coming election, asked the elector to permit him to take the card of the elector to the election board, we believe that such action would be legal. The entire object is to get the card back to the board, and so long as this is done without the card being altered in any way is, we believe, a full compliance with the law.

CONCLUSION

It is the opinion of this department that a circuit court may not order a board of election commissioners to register or reinstate an elector unless said appeal to the circuit court is taken within two days after the elector has been denied registration, or his name has been stricken from the register by said board, but that no time is fixed within which the circuit court is required to make its order to the board.

It is the further opinion of this department that no provision is made by law for breaking a tie vote on the board of election commissioners.

It is the further opinion of this department that in the case of a canvass of voters by mail, the return of the postal card sent out may be made in any manner which the elector sees fit to employ, including the return of the card to the board by a candidate in the pending election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

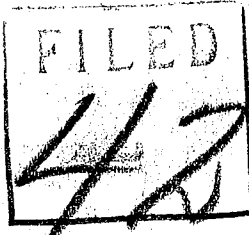
Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

CLASSIFICATION OF
COUNTIES:
COUNTIES:

Fourth class county which had an assessed valuation in excess of ten million dollars for each of the years 1949, 1950, 1951, 1952 and 1953 becomes a third class county at the beginning of the fiscal year January 1, 1955.



December 16, 1954

Honorable John Hoamer
Prosecuting Attorney-Elect
Webster County
Marshfield, Missouri

Dear Sir:

This is in response to your request as prosecuting attorney-elect for an opinion of this office contained in your letter dated November 27, 1954, as elaborated by your letter of December 2, 1954. In view of the length of these letters, your request will be paraphrased for the purposes of this opinion.

You state that for each of the years 1949, 1950, 1951, 1952, and 1953, Webster County had an assessed valuation as certified by the State Tax Commission in excess of ten million dollars, and request an opinion of this office as to the date upon which the change in the classification of Webster County from fourth class to third class becomes effective.

The change of classification of counties is governed by the provisions of Section 48.030 RSMo 1949, which reads as follows:

"For the purpose of determining the initial class of the various counties, the assessed valuations of the respective counties as set forth on pages 333 to 400 of the 'Journal of the Board of Equalization of the State of Missouri for the Year Ending December 31, 1944' shall be used; provided, however, that hereafter no county shall be deemed as moving from a lower class to a higher class or from

Honorable John Hosmer

a higher class to a lower class until the assessed valuation of said county shall have been such as to place it in such other class for five successive years; provided further, that the change from one classification to another shall become effective at the beginning of the county fiscal year following the next general election after the certification by the state equalizing agency for the fifth successive year that said county possesses an assessed valuation placing it in another class; provided further, that if a general election shall be held between the date of such certification and the end of the current fiscal year, such change of classification shall not become effective until the beginning of the county fiscal year following the next succeeding general election. (L. 1945 p. 1801 Sec. 3)"

The certification referred to in the above statute is that contained in the annual report of the State Tax Commission which is made pursuant to the requirements of Section 138.440, RSMo 1949 which must contain all of the proceedings and decisions of such tax commission while acting as a board of equalization. Such report contains the finally complete and accurate determination of the assessed valuation of the various counties of the state. This report is made as of December 31st of each year, and such date is the one on which the determination of your problem hinges. Thus, the certification referred to in the above-quoted statute for the year 1953, was made as of December 31, 1953, and since 1953 was the fifth year in which Webster County had an assessed valuation in excess of ten million dollars, that date determines the time at which the change in classification in Webster County becomes effective.

Applying the provisions of Section 48.030, RSMo 1949, to these facts, it appears that upon the certification in the annual report of the State Tax Commission, as of December 31, 1953, Webster County had had an assessed valuation in excess of ten million dollars for five successive years, and thus was eligible for classification as a third class county. The next general election after this certification as of December 31, 1953, occurred in November, 1954, and the change becomes effective at the beginning of the county fiscal year following such general election. The fiscal

Honorable John Hosmer

year of counties runs from January 1 to December 31, of each calendar year under the provisions of Section 150.010, RSMo 1949, and thus Webster County becomes a third class county as of January 1, 1955.

Section 48.040 RSMo 1949 provides for notification of such a change in classification by the state auditor; however, a failure to so notify does not prevent a change in classification since the act of the auditor in such matter is ministerial in nature. See opinion of this office dated November 22, 1954, to the Honorable Stephen R. Pratt, Prosecuting Attorney, Clay County, a copy of which is enclosed herewith, for a more extensive consideration of this problem.

As to the effect of this change of classification upon the salaries of the various county officers, see opinion of this office dated January 29, 1953, to Honorable Curt M. Vogel, Prosecuting Attorney of Perry County, a copy of which opinion is enclosed herewith for your information.

CONCLUSION

From the foregoing, it is the conclusion of this office that Webster County becomes a third class county effective at the beginning of its fiscal year, January 1, 1955.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Very truly yours,

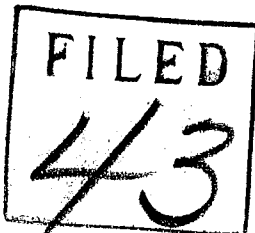
John M. Dalton
Attorney General

Enc. 2 Opns. to -
Hon. Stephen R. Pratt, 11-22-54;
Hon. Curt M. Vogel, 1-29-53.

FLH:sm,1w

PUBLIC ROADS
COUNTY COURT
ADMINISTRATIVE LAW
APPEALS

In proceeding before county court on petition to establish or vacate public road, county court required to cause stenographic record to be made of proceeding only on request and at expense of petitioner or remonstrator. Appeal from decisions of county court and scope of review governed by Sec. 22, Art. V, Const. Mo. 1945.



March 26, 1954

Mr. Harold S. Hutchison
Prosecuting Attorney
Maries County
Vienna, Missouri

Dear Mr. Hutchison:

I have your request for an opinion as to the liability of the County Court of Maries County for keeping a stenographic record in a petition to vacate a road, said request, in part, reading as follows:

"A petition was presented, together with proof of notice to vacate a road in Maries County. Remonstrance was filed and the case came on for hearing before the Court. The Court by its order vacated the road and thereupon the remonstrators filed a petition for judicial review. Neither the petitioner nor the remonstrators having requested a stenographic record to be made at the proceedings before the County Court.

"The opinion requested is whether or not section 228.120 R. S. Mo. 1949 is the controlling statute in this case, or whether or not as has been contended that the County Court would be obligated under Chapter 536 R. S. Mo. 1949 to conform to the procedure of other administrative agencies and 'unless agreed by all parties, each agency shall cause all proceedings and hearings before it in contested cases to be taken down stenographically by a competent stenographer.'"

Mr. Harold S. Hutchison

The section of the Statutes which you have quoted in Paragraph 2 of your letter, dealing with administrative procedure and review, is Paragraph 2 of Section 536.060, passed in 1945. The other section of the Statutes to which you make reference is Paragraph 1 of Section 228.120, passed in 1949, which reads as follows:

"1. Upon the request and at the expense of any petitioners or remonstrators, a stenographic record shall be made of all proceedings before the county court upon any petition to establish or vacate any public road."

In order to make Section 228.120 effective here, it must be assumed that the proceeding is one to vacate a public road.

It will be observed that Paragraph 1 of Section 228.120 deals specifically with the subject of a stenographic record in a petition before the county court to vacate a public road, and was passed subsequent to Paragraph 2 of Section 536.060, which deals generally with the procedure of agencies as pertains to administrative procedure and review. When dealing with statutes which may appear to be in conflict, the courts follow certain recognized rules. The case of *State v. Davis*, 284 S.W. 464, 470, quoting from 36 Cyc. 1147, states that the following is the rule in Missouri:

"Statutes in pari materia are those which relate to the same person or thing, or to the same class of persons or things So far as reasonably possible the statutes, although seemingly in conflict with each other, should be harmonized and force and effect given to each, as it will not be presumed that the Legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms; nor will it be presumed that the Legislature intended to leave on the statute books two contradictory enactments."

Again in *Gilkeson v. Railroad*, 222 Mo. 173, 204, the general rule is stated to be:

"* * * Where there are two statutes and the provisions of one apply specially to a particular subject, which clearly includes the

Mr. Harold S. Hutchison

matter in question, and the other general in its terms, and such that if standing alone it would include the same matter, and thus conflict with each other, then the former act must be taken as constituting an exception, if not a repeal of the latter or general statute, and especially is this true where the special statute was enacted subsequent to the passage of the general. * * *

Eagleton v. Murphy, 156 S.W. (2d) 683, 685, states:

"* * * Under the established rules of statutory construction where there are two laws relating to the same subject they must be read together and the provisions of the one having a special application to a particular subject will be deemed to be a qualification of, or an exception to, the other act general in its terms."

Hannibal Trust Co. v. Elzea et al., 286 S.W. 371, 378, says:

"It is an established principle that all statutes are presumed to be enacted by the Legislature with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed as a part of a general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the Constitution, but also in connection with other statutes on the same subject, and even where two statutes are in apparent conflict, they should be so construed, if reasonably possible, as to allow both to stand and to give force and effect to each."

Applying these rules of construction as herein set out, it would appear that Paragraph 1 of Section 228.120, applying specifically to a particular subject and being a later enactment, should be given effect, it being possible to harmonize the statutes by construing this paragraph as an exception to the general provision of Paragraph 2, Section 536.060, dealing with the procedure and review of administrative agencies generally. Thus, the answer to

Mr. Harold S. Hutchison

your question #2, asking, "In intermingling Section 228.120 and Sections of Chapter 536 R.S. Mo., 1949, can the County Court be forced to take stenographic record of their proceedings in the contested case under the rules?", would appear to be "no" in the absence of a specific request by, and at the expense of, a petitioner or remonstrator.

Section 478.070, R. S. Mo., 1949, provides that the circuit court shall have appellate jurisdiction from the judgment and orders of county courts - this has been a provision of the statutes long before the adoption of the new Constitution. Section 512.110 provides that "... the appellant shall cause the transcript on appeal . . . to be prepared and filed with the clerk of the proper appellate court" Chapter 536, R. S. Mo., 1949, dealing with administrative procedure and review, is taken from Laws 1945, after the 1945 Constitution was adopted. Section 536.100 thereof, provides that "Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof, as provided in Section 536.100 to 536.140, unless some other provision for judicial review is provided by statute;" Paragraph 2 of Section 228.120, passed in 1949, reads: "Any order of the county court establishing or vacating a public road shall be subject to judicial review to the same extent and in the manner prescribed by chapter 536, R. S. Mo. 1949." And Section 536.110 provides: "1. Proceedings for review may be instituted by filing a petition in the circuit court or court of common pleas of the county of the plaintiff's residence within thirty days after the mailing or delivery of the notice of the agency's final decision." Thus, under either procedure, your question #1, "Under the above circumstances does Section 228.120 make it incumbent upon the party asking redress to submit the records to the circuit court?", should be answered in the affirmative. And, although the determination of the applicable procedure sections are not involved in the opinion request, this office herewith indicates that Chapter 536 should be followed in securing judicial review rather than referring to Section 512.110 et seq., since the Legislature in Section 228.120, a more recent statute, through use of the words "to the same extent and in the manner prescribed by Chapter 536" would seem to have evidenced their intention to specifically follow the procedure as therein set out in this instance and not be controlled by the exclusion in that chapter as set out in Section 536.100.

Mr. Harold S. Hutchison

Your third and final question asks: "In view of the decision in the Kansas City v. Rooney is there any distinction between an appeal from the County Court and a petition for judicial review? And if there is a distinction, how is the County Court going to determine at the time they have their hearing as to what the losing party contemplates as to the keeping of the record?" The procedure to be followed and the scope of review on an appeal from the judgment and orders of the county court prior to the Missouri Constitution of 1945 is provided by Section 49.230, which provides that ". . . when any case shall be removed into a court of appellate jurisdiction by appeal from a county court, such appellate court shall thereupon be possessed of such cause, and shall proceed to hear and determine the same anew, and in the same manner as if such cause had originated in such appellate court" But the case of Kansas City v. Rooney, Judge, 254 S.W. (2d), 626, 627, states as follows: "However, the 1945 Constitution has taken all judicial power from the county court so that it is no longer a judicial court but has become an administrative body. Section 22 of Article V of the Constitution authorizes appeals from decisions of administrative bodies and provides the scope of review. Wood vs. Wagner Electric Corporation, 355 Mo. 670, 197 S. W. (2d), 647, 649. Therefore, the scope of review on any appeal from the county court is that provided by Section 22, Article V. . . .", namely: "'such review shall include the determination * * * whether the same are supported by competent and substantial evidence upon the whole record.'" Thus, it will be seen that the court therein employed the terms appeal and review to describe the method used for appeals from administrative bodies and the scope of review thereof, as provided by Section 22, Article V of the new Constitution. Hence, whatever term is used, the procedure followed is that outlined by Constitution Article V, Section 22. The keeping of the record in this instance must be as is provided in the answer to question #2.

CONCLUSION

It is the opinion of this office that in a proceeding before the county court on any petition to establish or vacate any public road, the county court shall be required to cause a stenographic record to be made of all proceedings only upon the request and at the expense of any petitioner or remonstrator; that the appeal from decisions of the county court and the scope of review thereof is that provided by Section 22, Article V, of the Constitution of Missouri.

Mr. Harold S. Hutchison

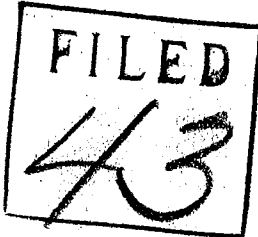
The foregoing opinion, which I hereby approve, was prepared by my assistant, J. Robert Tull.

Yours very truly,

John M. Dalton
Attorney General

TAX LEVY:
COUNTY/SUPERINTENDENT:
SCHOOL DISTRICTS:

A county superintendent of schools cannot be compelled to submit more than one budget estimate to school districts within his jurisdiction, but can amend the budget; that no such authority is vested in the county board of education.



April 7, 1954

Honorable B. M. Husted
Representative
Putnam County
RFD
Worthington, Missouri

Dear Sir:

You thus state your recent request for an official opinion:

"I would like very much to have your opinion in the following matter:

"Our County Superintendent of Schools made up his budgets on March the First as required by law for the school districts under his jurisdiction, listing in detail the estimated receipts and disbursements. He also showed the required school levies. After these required tax levies were sent to the County Clerk and the County tax books were made up, a high school board decided to increase the high school tuition charge to these districts.

"Is the County superintendent in this case compelled to change his budgets and require the rural districts to pay the increase? Although the teachers' fund of the high school district had an increase of Three Thousand Dollars in the surplus this increase will be used to build up this surplus.

"Will the rural districts which do not have sufficient funds to pay this increase be required to pay this amount next year?

"Does the County Board of Education have any jurisdiction in this matter?"

We note that Putnam is a county of the third class.

Honorable B. M. Husted

Your first question is: "Is the county superintendent in this case compelled to change his budget and require the rural districts to pay the increase?"

In regard to this matter, we direct attention to paragraph 1 of Section 167.200 RSMo 1949, which reads:

"1. For the information and guidance of the officers and qualified voters, in connection with the problem of school tax rates, the county superintendent of schools in each county of the third class shall, not later than the first day of March of each year, in cooperation with the clerk of the board of such district, prepare, or cause to be prepared for each school district under his supervision, a detailed budget of estimated receipts and disbursements, including the amount of receipts recommended as necessary from district taxes. Such budget shall list estimated receipts by funds and sources, and estimated disbursements by funds and purposes, in such detail as may be prescribed by law and by the state board of education; and shall have appended thereto a statement of the rate of levy per hundred dollars of assessed valuation required to raise each amount shown on the budget as coming from district taxes. The district clerk shall add a condensed copy of said budget to each required notice of the annual meeting. In the expenditures of said district during the ensuing year, no variation shall be allowed from the totals shown in the budget estimate except on written authorization of the county superintendent. At the end of each school year, and not later than July fifteenth of each year, the clerk of each such district shall prepare a detailed report in form as may be prescribed by the state board of education showing all expenditures of the preceding year from various funds and sources, and such county superintendent shall audit and examine the same; and if such report is in conformity with the budget, or any modifications or variations therefrom as authorized by such county superintendent, he shall certify his approval thereof to the state board of education. In the event that expenditures exceed budget estimates, or modifications thereof, in the various funds in which state funds are made available, the excess expenditures shall be deducted from the allocation from the state funds for the ensuing year."

Honorable B. M. Husted

The law (para. 1 of Section 167.200, supra) makes it the duty of the county superintendent to prepare and submit a budget estimate not later than March 1st of each year, and nothing in the law imposes upon him the duty to submit any other estimate.

It would seem that in the common interest of reaching a satisfactory conclusion upon the budget matter, that the superintendent should cooperate fully with the district in this matter, can and should, if circumstances appear to make it desirable, amend his first budget. However, there certainly is no means by which he could be compelled to do so.

Your second question is whether the rural districts which do not have sufficient funds to pay this increase can be required to pay this amount next year?

In regard to this matter, we are enclosing an opinion written on September 13, 1948, to Honorable Joe W. Collins, Prosecuting Attorney of Cedar County.

We believe that this second question is answered by that opinion.

Your final question is: "Does the county board of education have any jurisdiction in this matter?"

The duties and powers of the county board of education are set forth in Section 165.673 RSMo 1949. Paragraphs 1, 2, 3, 4, and 6 of that section impose upon the county board the duty of studying the school system in their county, with a view to its reorganization, and the making of recommendations for reorganization to the state board of education; cooperation in school matters with adjoining counties; advising with the county superintendent regarding school matters generally.

Paragraph 5 of the above section rules:

"Approve the budget prepared by the county superintendent of schools in cooperation with the clerks of the boards of the several districts and approve the audit, made by the county superintendent, of the expenditures report prepared by the district clerk and submitted for the approval of the state board of education."

We cannot see that the above-quoted paragraph of Section 165.673, supra, or any other statute or case, gives the county board of education any authority to act regarding an increased levy in any district within their county.

Honorable B. M. Husted

CONCLUSION

It is the opinion of this department that a county superintendent of schools cannot be compelled to submit more than one budget estimate to school districts within his jurisdiction; but can amend the budget; that no such authority is vested in the county board of education.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

VOTING:
BALLOTS:

In voting upon two separate propositions regarding the restraint of animals over two different areas which are not identical, separate ballots should be used.

October 7, 1954



Honorable W. R. J. Hughes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"In telephone conversation with Mr. Wm. Berry of your staff, he asked me to write you for an official opinion on the following questions, and to tell you that we would appreciate your expediting the answer so that the County Clerk can have Ballots printed immediately.

"A petition asking election under section 270.130 to restrain all animals within two townships in one body was filed some time ago and an election ordered; about 1½ months later another petition affecting 3 townships, but including the 2 townships in 1st petition and asking for the same restraint, was filed and election ordered.

"The 1st question is whether 2 separate ballots each referring to 1 of the petitions will be necessary in the townships affected.

"The 2nd question is as to the form of the ballot or ballots to be used. We would appreciate your suggesting a certain form for such ballot or ballots."

Section 270.090 RSMo 1949, reads:

"The county court of any county in this state, upon the petition of one hundred householders

Honorable W. R. J. Hughes

of such county, at a general election, and may upon such petition of one hundred householders, at a special election, called for that purpose, cause to be submitted to the qualified voters of such county the question of enforcing, in such county, the provisions of this chapter. Said petitioners shall state in their petition to said court what species of the domestic animals enumerated in Section 270.010 they desire the provisions of this chapter enforced against, and may include one or more of said animals in said petition; and said court shall cause notice to be given that such vote will be taken, by publishing notice of the same in a newspaper published in such county, for three weeks consecutively, the last insertion of which shall be at least ten days before the day of such election, and by posting up printed notices thereof at three of the most public places in each township in such county, at least twenty days before said election; said notices shall state what species of domestic animals on which the vote will be taken, to enforce the provisions of this chapter against running at large in such county, which shall be the same as petitioned for to said court."

Section 270.100 RSMo 1949 reads as follows:

"1. There shall be written or printed on each ballot voted at said election of either of the following sentences:

"For enforcing the law restraining (insert the name of animals in petition) from running at large."

"Against enforcing the law restraining (insert the name of animals in petition) from running at large."

"2. Any such election, the voting thereat, making returns thereof, and casting up the result, shall be governed in all respects by the laws applicable to general elections for state and county purposes."

We feel that to the above there should be added the name of the townships which are the subject of the election. The ballot would then read, for example, as follows:

Honorable W. R. J. Hughes

"For enforcing the law restraining (insert here the names of the animals in the petition) from running at large in Brown and Blue townships in Dark County, Missouri."

The alternative line would be in the same form, of course, to-wit,

"Against enforcing the law restraining, etc."

Section 270.130 RSMo 1949, reads:

"Whenever two or more townships in one body in any county in the state of Missouri, by petition of one hundred householders, not less than ten of whom shall be from any one of said townships, petition the county court for the privilege to vote on the question of restraining horses, mules, asses, cattle, goats, swine and sheep from running at large, the same law governing counties is hereby applied to said townships, and said petitioners shall not be debarred the right to restrain said animals if a majority of the qualified voters of said townships, voting at any general or special election, shall vote in favor of so restraining such animals. Nothing in this section shall be so construed as to debar the right of restraining any two or more species of such animals; provided, however, that nothing in this section or chapter shall be construed to prevent the petitioning for and holding of an election to permit animals to run at large in any township or townships that have voted to restrain said animals from running at large, notwithstanding the county or township has theretofore voted to restrain animals from running at large."

From the above Section 270.130, supra, we see that the form of ballot set forth in Section 270.100, supra, is one which may be followed by you, which we believe fully answers your second question.

Your first question is whether it will be necessary to have a ballot for voting on the proposition contained in the first petition filed, and another and separate ballot for voting on the proposition contained in the second petition.

Honorable W. R. J. Hughes

The form of ballot set forth in Section 270.100, supra, clearly contemplates that only one proposition is to be voted on. We are unable to find any authority for a consolidation of the two propositions before you, and in fact do not readily see how such a consolidated ballot could be clearly stated, in view of which we believe that separate ballots should be used.

CONCLUSION

It is the opinion of this department that in voting upon two separate propositions regarding the restraint of animals over two areas which are not identical, separate ballots should be used.

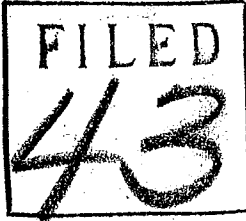
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

STOCK LAW: Proposition to invoke stock law by two or more
ELECTIONS: townships, under Section 270.130 RSMo 1949,
submitted at general election, requires vote of
majority of voters in townships who vote at such
general election to effect adoption. Mere
majority of voters voting on the proposition is
insufficient.



November 11, 1954

Honorable W. R. J. Hughes
Prosecuting Attorney
Iron County
Box 214
Ironton, Missouri

Dear Mr. Hughes:

This opinion is rendered in reply to your request of
November 8, 1954, and the question you posed is briefly re-
stated in the following language:

When two or more townships have petitioned
the county court for the privilege of voting
on the question of restraining animals from
running at large, under the provisions of
Section 270.130 RSMo 1949, and such proposi-
tion has been submitted to the voters at the
time a general election is held, will a
majority of the qualified voters voting in
the township on the proposition cause it to
carry, or must the proposition be voted by
a majority of all voters voting in the town-
ships at the general election?

Section 270.130 RSMo 1949 provides as follows:

"Whenever two or more townships in one body
in any county in the state of Missouri, by
petition of one hundred householders, not
less than ten of whom shall be from any one
of said townships, petition the county court
for the privilege to vote on the question of
restraining horses, mules, asses, cattle,
goats, swine and sheep from running at large,

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the same law governing counties is hereby applied to said townships, and said petitioners shall not be debarred the right to restrain said animals if a majority of the qualified voters of said townships, voting at any general or special election, shall vote in favor of so restraining such animals. Nothing in this section shall be so construed as to debar the right of restraining any two or more species of such animals; provided, however, that nothing in this section or chapter shall be construed to prevent the petitioning for and holding of an election to permit animals to run at large in any township or townships that have voted to restrain said animals from running at large, notwithstanding the county or township has theretofore voted to restrain animals from running at large."

In the case of State ex rel. v. Wilson, 129 Mo. App. 242, 108 S.W. 128, the St. Louis Court of Appeals was construing Section 4788 R.S. Mo. 1899, which contained the following language now found in Section 270.130 RSMo 1949, supra:

"* * * and said petitioners shall not be debarred the right to restrain said animals if a majority of the qualified voters of said townships, voting at any general or special election, shall vote in favor of so restraining such animals. * * *"

The above quoted provision is now found unchanged in Section 270.130 RSMo 1949, and we consider the facts outlined in State ex rel. v. Wilson, supra, to be no different from those involved in the problem we now consider, to-wit, that the proposition was submitted at a general election. In ruling the question, the Court adopted the following language of the trial judge in State ex rel. v. Wilson, 108 S.W. 128, 129 Mo. App. 242, l.c. 246:

Honorable W. R. J. Hughes

"* * * it is evident that the Legislature intended to require more to adopt the stock law by townships than by counties, that is, it may be adopted in a county by a majority of the qualified voters who vote on the proposition, but in order to adopt it in five townships, there must be in favor of the proposition a majority of the voters voting at the election. It appears by the return to the writ of certiorari in this case that the vote on the proposition was taken at the general election held November 8, 1906, and that there were polled at such election 2,030 votes, of which 903 voted in favor of the proposition. This not being a majority of the voters voting at such election, the law was not adopted'."

CONCLUSION

It is the opinion of this office that when a proposition to restrain animals from running at large is submitted to the voters of two or more townships, under the provisions of Section 270.130 RSMo 1949, at a general election, the proposition will not carry unless voted by a majority of the qualified voters of such townships who cast their vote in the general election, as distinguished from a majority of the qualified voters of such townships who vote only on the proposition submitted at such general election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

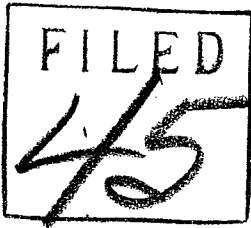
Yours very truly,

JOHN M. DALTON
Attorney General

JLO'M:vlw

FEDERAL OLD
SOLDIERS' HOME:

Board of Trustees of Federal Old Soldiers' Home at St. James, Missouri, is not authorized under Section 212.130, RSMo. 1949, to require a pensioned resident-member of the Home to pay out his or her pension into the Federal Soldiers' Home during the time of their membership in the Home.



January 14, 1954

Mr. W. W. Jackson
President, Board of Trustees
Federal Soldiers' Home
St. James, Missouri

Dear Sir:

This office is in receipt of a request from your department for an official opinion which reads:

"I am writing to you as the President of the Board of Trustees of the Federal Soldiers Home of Missouri, here at St. James.

"The Board of Trustees are preparing to revise their By-Laws, Rules and Regulations for the government of the Federal Soldiers Home. We prepare these rules, regulations and by-laws as provided for in Sec. 212.130 Missouri Revised Statutes of 1949.

"There is a question that has been bothering the Board of Trustees for some time and now that we are preparing a revision of the by-laws, rules, and regulations, it seems that we should have your opinion on this point.

"Does the Board of Trustees have the authority or power to require a pensioner to pay a portion or all of their pension to the Soldiers Home during the time they live at the Home as a member of it?

"I have learned that the Federal Government in their laws permit it and says that it is up to the State to make its own requirements. Also I find that at least the States of Iowa and Indiana do charge their members of the State Soldiers Homes a portion of their pensions.

Mr. W. W. Jackson

"The reason we are thinking of providing for a charge to the members who are Federal Pensioners is that we find a pensioner may be indigent from the standpoint that he is not able to care for himself on his pension, but if we admit him or her as a member of the Home and care for them, he or she does not need all of the pension the Federal Government is paying them and we think it right and proper that the Home charge at least a portion of the pension to help pay for his care and keep.

"So I am asking as president of the Board of Trustees whether we may make the charge as a part of our Regulations or is that a matter for the Legislature to decide?"

In order to determine the power and authority of the Board of Trustees to require a pensioner to pay a portion or all of a pension to the Soldiers' Home, we must first look back to the original law for the Federal Soldiers' Home at St. James, which is contained in Laws 1897, page 28, et seq. Section 1 thereof provided as follows:

"Section 1. That the governor of the state of Missouri be and he is hereby authorized and empowered to appoint, by and with the advice and consent of the senate, a board of trustees to be composed of nine members of whom six shall have served as soldiers or sailors in the volunteer army or navy of the United States, and three of the others may be members of the woman's relief corps of the state of Missouri, and who shall be citizens of the state of Missouri, and whose duty it shall be to establish and maintain a home in the state of Missouri for disabled and indigent soldiers and sailors and army nurses who enlisted, served and participated in the Mexican war and the war of the rebellion for the preservation of the union of the United States; and also for the aged wives of such soldiers and sailors."

Section 2, which provided for the organization of a Board and meeting place, the terms of, their appointment, is omitted here for purposes of brevity.

Section 3, on page 30, Laws 1897, is as follows:

Mr. W. W. Jackson

"The said board of trustees is hereby authorized and empowered to receive for a nominal consideration from the corporation known as the 'Women's relief corps soldiers' home' a good and sufficient conveyance of the property, comprising fifty-nine acres, more or less, in or near St. James, in the county of Phelps, known as the soldiers' home of said place, vesting the title to said property in the state of Missouri."

Omitting Section 4 it was provided in Section 5, as follows:

"That the soldiers and sailors who shall be entitled to admission into said home shall be citizens of the State of Missouri, who were honorably discharged from the service of the United States, and who are in indigent circumstances and from any disability (not received in any illegal act) are unable to support themselves by manual labor, and that the aged wife of such soldier or sailor, and army nurses who served with the armies of the United States, shall also be entitled to admission in said home, provided they be in indigent circumstances and unable to support themselves by manual labor."

The context of Laws of 1897, page 28, above, shows that the members of the Home were required by the Legislature as a condition for their admission to be indigent and since old soldiers under almost identical circumstances as provided in Section 5, supra, for admission to the Home were then entitled to federal pensions, it should be assumed that the Legislature had knowledge of the law at the time they originally provided for admission to the Home.

In the Matter of Hale v. Stimson, 198 Mo. 134, in 1906, Judge Henry Lamm said in that opinion as follows: (l.c. 153, 154)

"The General Assembly enacting that amendment passed two other acts (Laws 1897, pp.26 et seq.) --one of them pertaining to the Confederate Home at Higginsville, the other to the Federal Soldiers' Home at St. James. They are twin enactments containing the same provisions, mutatis, mutandis, having the same motif--the one, taking unto the State the ownership and management of an existing Confederate Home at Higginsville, the other, an existing Federal Soldiers' Home at St. James. At one

Mr. W. W. Jackson

home, the infirm and indigent ex-confederate soldiers and sailors, their wives, widows and orphans had been maintained by private beneficence and were to be thereafter maintained by the State. At the other, there had been maintained by private means the disabled and indigent soldiers engaged in the civil war for the preservation of the union of the United States, and their aged wives, and thereafter these were to be maintained, as well as those who served and participated in the Mexican war, by the State. By the one, it was contracted that the Confederate Home should be maintained for a term of twenty years, or so long as shall be needed for the purposes of the act, and the consideration was the absolute transfer to the State of 362.86 acres of land near Higginsville in Lafayette county, less a cemetery lot. The other act was also contractual in character and based on the consideration of the transfer by the 'Woman's Relief Corps Soldiers' Home' of a good and sufficient conveyance of 59 acres, more or less, in or near St. James in the county of Phelps. By the one, there seems to have been no limitation on the discretion of the board of managers to admit occupants to the Confederate Home, except, generally, that such occupants should be infirm and indigent ex-confederate soldiers and sailors, their wives, widows and orphans. By the other, there was a restriction, to-wit, the soldiers and sailors were required to be citizens of the State of Missouri who were honorably discharged from the service of the United States and who are in indigent circumstances and, from any disability (not received in any illegal act), are unable to support themselves by manual labor, providing further that the aged wives of such soldiers or sailors and army nurses who served with the armies of the United States, if indigent and unable to support themselves by manual labor, shall also be entitled to admission. By both acts, county courts or the friends of the applicants were required to pay the expenses of sending them to said homes."

The words of the learned Judge which summarized the above quoted Laws of 1897, are now to be found almost verbatim in Section 212.140, RSMo. 1949.

In the Hale v. Stimson case, supra, it was contended that the members of the Home were not entitled to vote under the prohibition

Mr. W. W. Jackson

that no person kept at any poorhouse or asylum at public expense shall be entitled to vote at any election under the laws of this state. It was assumed and admitted by Judge Lamm in that opinion that on account of the contract which the State consummated by the law of 1897, that the members of the Federal Soldiers' Home be kept without charge.

At this late date after sixty-six years of interpretation by the officers of this state and others, not only can it be said that from an interpretation of the actual words of the statute and its clear context but the history of construction as reported in *Hale v. Stimson*, supra, the only conclusion is that it was never intended that the members of the Federal Soldiers' Home be charged for their keep.

In *State v. Thompson*, 85 S.W.(2d) 594, at l.c. 600, our Supreme Court quoted from *State ex rel. White vs. Ferndorff*, 317 Mo. 579, 586, 296 S.W. 787, 789, this doctrine is approvingly quoted from Cyc. pages 1140, 1141:

"* * *The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous.' (Italics ours.)"

CONCLUSION

Therefore, it is the conclusion of this office that the Board of Trustees of the Federal Soldiers' Home at St. James, Missouri is not authorized under Section 212.130, RSMo 1949, to require a pensioned resident-member of the Home to pay out his or her pension into the Federal Soldiers' Home during the time of membership in the Home.

This opinion which I hereby approve, was written by my assistant, Mr. James W. Faris.

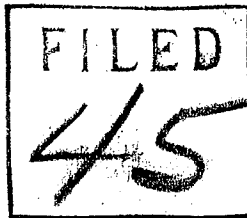
Yours very truly,

JOHN M. DALTON
Attorney General

COUNTY BOARD OF EQUALIZATION:

PROSECUTING ATTORNEY:

When a writ of certiorari is issued against a county board of equalization, it is part of the official duty of the prosecuting attorney of the county to represent the board in all subsequent legal proceedings relative to the issuance of the writ.



September 14, 1954

Honorable Duncan R. Jennings
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"A Writ of Certiorari has been directed against Arthur Seiler, Otis Leamaster, Oscar Lichte, Walter Baher and William Palmer, as members of the Montgomery County Board of Equalization.

"Request an opinion as to whether or not the Prosecuting Attorney is required, in his official capacity, to represent said parties, or if not, can he be retained in his civil capacity to represent said parties and be paid a fee by the County of Montgomery."

The duties of prosecuting attorneys are set forth in Section 56.060, RSMo 1949, which reads in part:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. * * *"

Also, in Section 56.070, RSMo 1949, which reads:

"He shall prosecute or defend, as the case

may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before the magistrate courts, when the state is made a party thereto; provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

For our purpose here the pertinent parts of the above sections are those which impose upon the prosecuting attorney the duty to "defend all civil suits against the state or county;" "defend all civil suits in which the county is interested;" "represent the county generally in all matters of law."

The question which we have to answer is whether a writ of certiorari directed against a county board of equalization constitutes a suit against the state or county; whether it is a suit in which the county is interested; whether it is a "matter of law" in which the county needs and is entitled to legal advice and representation.

We believe it to be all of these things. The county board of equalization is provided for by paragraph 1. of Section 138.010, RSMo 1949, which reads:

"Membership of county board of equalization --
1. In every county in this state, except as otherwise provided by law, there shall be a county board of equalization consisting of the judges of the county court, the county

assessor, the county surveyor, and the county clerk who shall be secretary of the board without vote."

The duties are set forth by Section 138.030, RSMo 1949, which reads:

"Oath of members -- powers and duties. --

1. The members of the county board of equalization shall each take an oath, to be administered by the clerk, to fairly and impartially equalize the valuation of all taxable real estate and tangible personal property in the county.

"2. Said board shall have the power and the duty to hear complaints and to equalize the valuation and assessments upon all taxable real and tangible personal property within the county so that all such property shall be entered on the tax book at its true value; provided, that said board shall not reduce the valuation of the real or tangible personal property of the county below the value thereof as fixed by the state tax commission."

It will be noted that the duties of the board pertain to taxation, which is a matter in which the county and the state are certainly vitally interested and concerned.

A writ of certiorari issued against a county board of equalization would have the effect of removing from the jurisdiction of the board a matter pertaining to taxation and placing the matter in the hands of a court for decision. This obviously could very substantially affect the revenue which would be obtained by a county. We believe that an action such as this of certiorari against a county board of equalization is an action against the county and/or state; and that it is a matter in which the county is interested. Certainly, it is a "matter of law" in which the county is entitled to legal representation. We believe, too, that the members of a county board of equalization are county officers discharging county duties which would entitle them to the advice and assistance of the prosecuting attorney.

CONCLUSION

It is the opinion of this department that when a writ of certiorari is issued against a county board of equalization it is part of the official duty of the prosecuting attorney of the county to represent the board in all subsequent legal proceedings relative to the issuance of the writ.

Honorable Duncan R. Jennings

-4-

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW:DA

SCHOOLS: :The school board of a school district has
:no authority to call a special election to
Levy of tax rate: :vote on fixing a rate of taxation in said
:district which is not provided for by
:statute.

.....

FILED

November 8, 1954

Honorable D. R. Jennings
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Mr. Jennings:

This will be the opinion you requested from this office on the subject of whether or not a school board is required to call a special election for the purpose of voting a levy when the amount of said levy is fixed in a petition requesting that such special election be called. Your letter requesting the opinion reads as follows:

"Request an opinion as to whether or not a school board is required to call a special election for the purpose of voting a levy when the amount of said levy is fixed in said petition.

"School District No. 16 of the County of Montgomery has held from two to three elections and failed to vote the levy as submitted by the board. Since then the board has refused to call another election for the submission of a levy and a petition carrying the required number of signatures has been submitted to said board, which petition reads as follows:

"We, the undersigned qualified voters, equal to ten per cent or more of the number casting their votes for the directors of the school board at the last regular school election held in School District No. 16, County of Montgomery, State of Missouri, desire that a special meeting of the qualified voters of said district be called for the

Honorable D. R. Jennings:

purpose of voting a levy of one dollar and ninety-five cents (\$1.95) on each one hundred dollars (\$100.00) assessed valuation of said district.

"Therefore, I would appreciate your advising as to whether or not the board should call a special election under said petition and since the time for closing the books is growing very short, will you please rush said opinion as fast as possible."

Section 165.077, V.A.M.S. 1949, providing for the annual estimate of needs of a school district and the tax rate to be levied by taxation to raise sufficient funds to maintain the district school for the ensuing year reads as follows:

"The board of directors of each school district shall, on or before the fifteenth day of May of each year, forward to the county superintendent of schools an estimate of the amount of money to be raised by taxation for the ensuing school year, and the rate required to produce said amount, specifying by funds the amount and rate necessary to sustain the school or schools of the district for the time required by law or authorized by the qualified voters of the district, to meet principal and interest payments on the bonded debt of the district, and to provide such funds as may have been ordered by the qualified voters of the district for other legitimate district purposes, including the purchase of school building sites, buying or erecting school buildings, repairing and furnishing such buildings, and providing foot bridges across running streams."

This is the only section in our school code providing for fixing the amount of the annual rate of taxation for school purposes.

The next numbered section 165.080, V.A.M.S. 1949, Cum. Supp. 1953, page 263, provides in detail the procedure to be followed by school districts, boards of education, and others required to act in such matters, when it becomes necessary to increase the annual rate of taxation. That section reads as follows:

Honorable D. R. Jennings:

"Whenever it shall become necessary, in the judgment of the board of directors or board of education of any school district in this state, to increase the annual rate of taxation, authorized by the constitution for district purposes without voter approval, or when a number of the qualified voters of the district equal to ten per cent or more of the number casting their votes for the directors of the school board at the last school election in said district shall petition the board, in writing, for an increase of said rate, such board shall determine the rate of taxation necessary to be levied in excess of said authorized rate, and the purpose or purposes for which such increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective, and shall submit to the qualified voters of the district, at the annual school meeting or election, or at a special meeting or election called and held for that purpose, at the usual place or places of holding elections for members of such board, whether the rate of taxation shall be increased as proposed by said board, due notice having been given as required by section 165.200; and if the necessary majority of the qualified voters voting thereon, as required by article X, section 11 of the constitution, shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, and the number of years said rate is to be effective, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law."

Honorable D. R. Jennings:

The subject of the request for the opinion is not one of proceedings to increase the annual rate of taxation by a school district but is upon the question whether a school board is required to call a special election for the purpose of voting upon a levy independently specified in a petition, and not in conformity with the terms of Section 165.077, supra, when the amount of said levy is so fixed in said petition.

The question submitted is, therefore, whether a tax rate devised by individuals, and desired by them to be levied for school purposes, and sought to be submitted to a vote of the qualified voters of a school district in a special election, may be so fixed by a petition requesting that the matter be so submitted for a vote, and if a school district board is required to call such special election for voting on the question.

It appears that the petition noted and incorporated in your request was drawn with the purpose and idea in the minds of the petitioners that the petition was permissible under, and complied with, the terms of said Section 165.080, supra, with respect to the number of voters who submit the same and the calling of a special election to vote on whether the annual rate of taxation for school purposes might be increased. But the petition here being considered is not in response to any of the other terms or provisions of said Section 165.080, supra. That section relates solely to increasing the annual school rate of taxation. The petition submitted here is based upon the theory and purpose of the submission, at a special election called by the district board, of the proposition of voting on the adoption of a specific rate of taxation in the district, a sum calculated in terms of dollars and cents by petitioners, a plan sponsored, no doubt, by persons of well-meaning intentions, but not authorized by law. The petition, a copy of which is contained in your request, reveals the fact that the petitioners intended to, and did, request that a special election be called by the district school board and that at such special election there be submitted the question to the qualified voters of the district of approving or disapproving the rate of taxation specified in the petition, independent of said Sections 165.077 and 165.080, supra, for raising money by taxation with which to maintain the school in said district for the ensuing school year.

Honorable D. R. Jennings:

There is no statute in this State authorizing the fixing of a rate of taxation for raising money in that manner with which to maintain a school.

The decisions of the Appellate Courts of Missouri are numerous in which it is held that mandamus is a proper remedy to compel administrative or ministerial officers, such as boards of education, to perform duties imposed upon them by law when such officers refuse to act. But this is not that kind of situation. The statutes of this State make no provision for the submission by a school board or board of education to qualified voters of a school district, a question for the adoption or rejection of a levy of a rate of taxation not provided for by the statutes.

The petition in this case could not lawfully create or fix such a tax rate as is therein described. Under this petition the school board of District No. 16 in Montgomery County, Missouri, has no duty to perform therein and has no power to call a special election for the submission to the qualified voters of such district the question of the adoption or rejection of the rate of taxation mentioned in said petition for the maintenance of the public school in said district.

It seems plain that the school board of School District No. 16 in Montgomery County, Missouri, has no authority by law to do so and such board cannot be compelled to call a special election for the purpose of voting on a levy of a rate of taxation in such district named in the petition and as mentioned in your request.

CONCLUSION

Considering the premises, it is, therefore, the opinion of this office that the school board of District No. 16 in Montgomery County, Missouri, is not required to call a special election for the purpose of voting a levy of a rate of taxation for school purposes, where the amount of said levy is fixed in a petition to such school board requesting that a special election be called.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Very truly yours,

JOHN M. DALTON
Attorney General

GWC:irk

ELECTIONS: Coleman R. Smith not a qualified voter of State of Missouri for two years prior to February 16, 1954, due to previous conviction of a felony and without having subsequently obtained "full pardon" as such term is used in Section 111.060, RSMo 1949.



April 19, 1954

Honorable Clifford Jones
Chairman, House Committee on Elections
Missouri House of Representatives
State Capitol Building
Jefferson City, Missouri

Dear Mr. Jones:

The following opinion is rendered in reply to your letter of March 23, 1954, which was also signed by Honorable Richard H. Ichord and Honorable Robert W. Copeland, members of the subcommittee appointed by the House Committee on Elections. Notice is taken of the urgency of your request in view of the fact that the same was authorized by resolution adopted by the House Committee on Elections on March 16, 1954.

This task becomes less burdensome due to the effort of your Committee in making available to this office numerous documents and data to support the agreed question, and facts, quoted from your letter as follows:

"The question: Was Coleman R. Smith a qualified voter of the State of Missouri for two years preceding February 16, 1954, the date of a special election to fill a legislative vacancy in Sullivan County? (Art. III, Sec. 4, Mo. Const. 1945)

"Agreed Facts: On October 24, 1939, Coleman R. Smith was sentenced to the Alcoa Farms for a period of two years for stealing timber in Taney County. His date of birth was November 10, 1916; therefore he was 22 years, 11 months old on date of conviction. He was released from the

Honorable Clifford Jones

Intermediate Reformatory under Conditional Commutation of Sentence on April 25, 1940, and received a notification of discharge from the Board of Probation and Parole, Jefferson City, Missouri on October 24, 1941.

"The records in the Board of Probation and Parole office in the Secretary of State's office, show that no restoration of citizenship or pardon has been granted Coleman R. Smith.

"Both parties to the contest agree that Sec. 549.170 and Sec. 217.370 do not apply. Mr. Smith did not receive a Judicial Parole or Bench Parole (549.170) nor did he qualify under the 3/4th Statute (217.370)."

Article III, Section 4, Missouri's Constitution of 1945 provides:

"Each representative shall be twenty-four years of age, and next before the day of his election shall have been a qualified voter for two years and a resident of the county or district which he is chosen to represent for one year, if such county or district shall have been so long established, and if not, then of the county or district from which the same shall have been taken."

Article VIII, Section 2, Missouri's Constitution of 1945 touches upon the qualifications of voters and has sufficient bearing on this problem to necessitate its quotation, as follows:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no

Honorable Clifford Jones

person while kept in any poor house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting." (Underlining supplied.)

The underscored portion of Article VIII, Section 2, Missouri's Constitution of 1945, quoted above, stands as the Constitutional authorization for the numerous statutes we find in Missouri's laws which make persons convicted of certain felonies, or of crimes connected with the exercise of the right of suffrage, ineligible to vote or enjoy other designated civil or political rights, more commonly referred to as rights of citizenship.

At this point we turn to the specific statute under which Coleman R. Smith was convicted and sentenced in 1939. Section 560.485 RSMo 1949 (Sec. 4542 R. S. Mo. 1939) remains unchanged since Coleman R. Smith was charged and convicted thereunder, and reads as follows:

"Any person who shall take and carry away any trees, or parts thereof suitable for manufacture into the timber products herein named, or any logs, timber, lumber, staves, stavebolts, ties, piling, heading or shingles cut from such lands, with intent to convert the same to his own use or the use of his employer or principal, shall be deemed guilty of a felony, and upon conviction, shall be punished by imprisonment in the state penitentiary for a period of not more than five years, or by imprisonment in the county jail for a period of not less than three months, or by fine not less than three hundred dollars."

Section 560.485 RSMo 1949, quoted above, clearly discloses that the person convicted thereunder is to be deemed guilty of a "felony." Article III, Section 4, Missouri's Constitution of 1945, quoted supra, outlines the qualifications of a member of the Missouri House of Representatives. Although such constitutional provision does not specifically disqualify one who has been convicted of a felony, it does require that the person seeking to qualify as a member of the House of Representatives be a

Honorable Clifford Jones

"qualified voter." This requirement makes it necessary to turn to Article VIII, Section 2, Missouri's Constitution of 1945, quoted supra, Missouri's basic law touching qualifications of voters. When we seek to find in Article VIII, Section 2, Missouri's Constitution of 1945 language which would disqualify a person convicted of a felony, as a "qualified voter", we discover not a positive prohibition in relation thereto, but a mere grant of authority to the General Assembly to enact laws touching the subject. This grant of authority is in the following language:

"* * * and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting." (Underscoring supplied.)

Without argument it must be conceded that Coleman R. Smith was not convicted of a crime connected with the right of suffrage. However, uncontroverted facts disclose that he was convicted of a felony.

If Coleman R. Smith is, in view of the language found in the two constitutional provisions quoted above, not a "qualified voter," where do we place our finger on the legislative enactment so disqualifying him? Such enactment is not found in the language of the statute under which he was admittedly convicted. The placement of statutes by the legislature is often controlling when determining the scope of laws. At the time of conviction in this case Section 4542 R.S.Mo. 1939 was part of Article 5, Chapter 31, Revised Statutes of 1939, which Article 5 was entitled "Offenses Against Public and Private Property," and contained more than one hundred statutes defining particular criminal offenses against public and private property, and each statute defining an offense also prescribed a penalty therefor. In none of said statutes do we find a penalty provision calling for suspension or forfeiture of civil or political rights. However, near the close of said Article 5, we find Section 4561, a statute with over-all application to the preceding statutes found in such Article 5, and it reads as follows:

"Any person who shall be convicted of arson, burglary, robbery or larceny, in any degree, in this article specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the

Honorable Clifford Jones

provisions of this article, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust or profit, within this state: Provided, that the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years: Provided further, that in all cases where persons have been convicted under this article the disqualification provided may be removed by the pardon of the governor any time after one year from the date of conviction."

The body of statutes referred to above as being embraced in Article 5, are now found in Chapter 560 RSMo 1949, and the above quoted section 4561 R.S. Mo. 1939 is now Section 560.610 RSMo 1949, reading as follows:

"Any person who shall be convicted of arson, burglary, robbery or grand larceny, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this chapter, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust or profit, within this state; provided, that the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years; provided further, that in all cases where persons have been convicted under this chapter the disqualification provided may be removed by the pardon of the governor any time after one year from the date of conviction."

A reading of Section 4561 R.S.Mo. 1939, as it now appears at Section 560.610 RSMo 1949, discloses that little if any change has been made in its language. Where the statute formerly referred to crimes punishable under the article, it now makes reference to crimes punishable under the chapter.

Honorable Clifford Jones

The first portion of Section 560.610 RSMo 1949, as it appeared in Section 4561 R.S. Mo. 1939, makes the statute applicable to (1) any person who shall be convicted of arson, burglary, robbery or larceny, in any degree in the article specified, and (2) to any person who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of the article. Referring to the agreed facts submitted with the request for this opinion, it stands conceded that Coleman R. Smith was not sentenced to the penitentiary, thus taking him out of the classification at (2) above. The same admitted facts disclose that the crimes of burglary and robbery are not involved. As to larceny in any degree specified in said article, it is concluded that since Section 4542 R.S. Mo. 1939, now Section 560.485 RSMo 1949, makes the offense described therein a felony regardless of the amount of property taken, and without any reference to the crime of larceny in any degree, Coleman R. Smith was not convicted of larceny in any degree as specified in former Section 4561 R. S. Mo. 1939, now Section 560.610 RSMo 1949. This being so it is not necessary to further construe Section 560.610 RSMo 1949, as being applicable to the case being considered.

We next turn to the law of suffrage and elections and find Section 111.060 RSMo 1949, a statute of general application, providing as follows:

"All citizens of the United States, including residents of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person shall be entitled to vote at all elections by the people. Each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides. No idiot, no insane person and no person while kept in any poorhouse at public expense or while confined in any public prison shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of a felony, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full

Honorable Clifford Jones

pardon; and after a second conviction of felony or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

One needs only to compare the language of the foregoing Section 111.060 RSMo 1949 with the language found in Article VIII, Section 2, Missouri's Constitution of 1945, to conclude that such statute was written in the light of the constitutional provision and was meant to be the legislature's compliment to the constitution. The statute is clear and unambiguous in the following portion thereof:

"* * *; nor shall any person convicted of a felony, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or of a misdemeanor connected with the right of suffrage, he shall be forever excluded from voting."

Having heretofore concluded that Coleman R. Smith was convicted of a felony, it is now concluded that in the face of the clear language found in Section 111.060 RSMo 1949, he cannot be deemed a "qualified voter" as such term is used in Article III, Section 4, Missouri's Constitution of 1945, unless the evidence discloses that he has, subsequent to his conviction, been granted a full pardon, either by direct action of the Governor, or by the force and effect of a statute which would, upon compliance with its terms, automatically remove civil disabilities and restore rights of citizenship without the Governor's action.

Admitted facts disclose that Coleman R. Smith was sentenced to the Intermediate Reformatory for Young Men on October 24, 1939, and released on conditional commutation of sentence on April 25, 1940, with final discharge by the Board of Probation and Parole on October 24, 1941. At the time the conditional commutation of sentence was granted on April 25, 1940, the Governor's power to grant the same was found in Article V, Section 8, Missouri's Constitution of 1875, which section read as follows:

"The Governor shall have power to grant reprieves, commutations and pardons, after

Honorable Clifford Jones

conviction, for all offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. He shall, at each session of the General Assembly, communicate to that body each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of the commutation, pardon or reprieve, and the reason for granting the same."

What is meant by the term "full pardon" as the same is used in Section 111.060 RSMo 1949? Missouri statutes do not define the term. In 67 C.J.S., Pardons, Sec. 1,b, we find that pardons may be of several kinds. The following quotation is extracted from the foregoing citation:

"A pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed; it is a private, although official, act of the executive magistrate delivered to the individual for whose benefit it is intended. There are several kinds of pardons; thus a pardon may be full or partial, absolute or conditional. A pardon is full when it freely and unconditionally absolves the person from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided; * * *" (Underscoring supplied)

The "conditional commutation" issued in the case of Coleman Smith (Coleman R. Smith) contains no language from which we can attribute to it the character of a "full pardon" as such term is defined in the extracted quotation from C.J.S., supra. One needs only to read the "conditional commutation" to discover that it does not unconditionally absolve Coleman Smith (Coleman R. Smith)

Honorable Clifford Jones

from all the legal consequences of his crime and of his conviction, direct and collateral, including the penalty provided therefor. The document titled "Conditional Commutation" must be construed in the light of the provisions contained therein, and it cannot be concluded in this opinion that such "conditional commutation" constitutes a "full pardon" as such term is used in Section 111.060 RSMo 1949.

CONCLUSION

It is the opinion of this office that Coleman R. Smith was not a qualified voter of the State of Missouri for two years preceding February 16, 1954, the date of a special election to fill a vacancy from Sullivan County, Missouri in the Missouri House of Representatives, due to his previous conviction of a felony, and without having subsequently obtained a "full pardon" as such term is used in Section 111.060 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

Yours very truly,

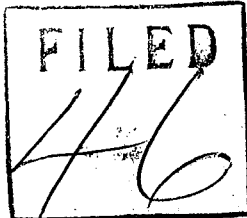
John M. Dalton
Attorney General

JLO'M/vtl

COUNTY COURT:
INTOXICATING LIQUOR:
LIQUOR DEPARTMENT:

County court authorized to charge a license fee to holder of a set-up license where intoxicating beverages are consumed on premises covered by said license.

September 22, 1954



Honorable Olin B. Johnson
Prosecuting Attorney
Schuyler County
Lancaster, Missouri

Dear Mr. Johnson:

This will acknowledge receipt of your request for a copy of an opinion rendered by this department to Honorable J. S. Lincoln, relative to public roads under date of June 23, 1954, a copy of which we are enclosing; also your request for an opinion which reads:

" * * *

"I have also received a request from our county court as to obtaining an opinion as to whether there is any authority for requiring a holder of a 'set-up' license where intoxicating beverages are consumed to also obtain a county license in addition to the state license."

We assume this question arises by reason of Section 311.480, RSMo 1949. Under Section 311.480, Subsection 3, Revised Statutes of Missouri, 1949, it provides that in any incorporated city having a population of more than 20,000 inhabitants, the board of aldermen, city council, or other proper authority, in addition to the license fee required by the state may require a license fee not to exceed \$300.00. This does not mean that by specifically authorizing only cities having a population of more than 20,000 inhabitants in said statute to also charge a particular fee for operating such place of business in said city, that it excludes counties and other cities from charging a license fee. Such a construction might be invoked under the statutory rule of construction that the inclusion of

Honorable Olin B. Johnson

one is the exclusion of all others. However, such a rule of construction should never be invoked to defeat the legislative intent or purpose in enacting such a statute.

We are of the opinion had it not been for the foregoing exception contained in Section 311.480 then such cities could have only charged for a license fee an amount not to exceed \$90, or one and one-half times that charged for a state license (See Section 311.220, Revised Statutes of Missouri 1949.) But the legislature desired to vest authority in such cities to charge more for such license fee.

Subsections 1 and 2 of Section 311.480, Revised Statutes of Missouri, 1949, read as follows:

"1. It shall be unlawful for any person operating any premises where food, beverages or entertainment are sold or provided for compensation, who does not possess a license for the sale of intoxicating liquor, to permit the drinking or consumption of intoxicating liquor in, on or about said premises between ten P.M. and six A.M. the following day, without having a license as in this section provided.

"2. Application for such license shall be made to the supervisor of liquor control on forms to be prescribed by him, describing the premises to be licensed and giving all other reasonable information required by the form. The license shall be issued upon the payment of the fee required herein.

"A license shall be required for each separate premises and shall expire on the thirtieth day of June next succeeding the date of such license. The license fee shall be sixty dollars per year and the applicant shall pay five dollars for each month or part thereof remaining from the date of the license to the next succeeding first of July. Applications for renewals of licenses shall be filed on or before the first of May of each year."

Subsection 3 of said section reads in part as follows:

"* * * In any incorporated city having a population of more than twenty thousand

Honorable Olin B. Johnson

inhabitants, the board of aldermen, city council, or other proper authorities of incorporated cities may, in addition to the license fee herein required, require a license not exceeding three hundred dollars per annum, payable to said incorporated cities, and provide for the collection thereof; * * *"

The statutory authority for the county court charging a license fee for such establishments will be found under Section 311.220, Revised Statutes of Missouri, 1949, which reads in part as follows:

"1. In addition to the permit fees and license fees and inspection fees by this law required to be paid into the state treasury, every holder of a permit or license authorized by this law shall pay into the county treasury of the county wherein the premises described and covered by such permit or license are located, or in case such premises are located in the city of St. Louis, to the collector of revenue of said city, a fee in such sum not in excess of the amount by this law required to be paid into the state treasury for such state permit or license, as the county court, or the corresponding authority in the city of St. Louis, as the case may be, shall by order of record determine, and shall pay into the treasury of the municipal corporation, wherein said premises are located, a license fee in such sum, not exceeding one and one-half times the amount by this law required to be paid into the state treasury for such state permit or license, as the law-making body of such municipality, including the city of St. Louis may by ordinance determine."

The foregoing statute makes it mandatory that every such state licensee whose premises are located in a county shall pay into said county treasury a sum not in excess of the amount provided by law to be paid into the state treasury for such permit or license as the county court shall by order

Honorable Olin B. Johnson

of record determine. In other words the county court may charge less than \$60, or an amount not to exceed \$60.

CONCLUSION

Therefore, it is the opinion of this department that a county court shall charge a license fee to every holder of a set-up permit or license where intoxicating liquor is consumed on the premises described and covered by such permit or license and when said premises are located in said county. Furthermore, said charge shall conform to the provisions of Section 311.220, Revised Statutes of Missouri, 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Yours very truly,

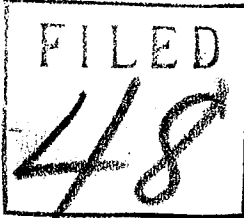
JOHN M. DALTON
Attorney General

Enclosure - J.S. Lincoln
Cainsville, Mo.
6-23-54

ARH:vlw

OLD AGE ASSISTANCE:
DIVISION OF WELFARE:

Determination of State Division of Welfare that an applicant for old age assistance is legally ineligible, if based upon evidence applicant was owner of insurance policy having cash surrendervalue of \$600, being in excess of maximum allowed by Subsection 5, Sec. 208.010, Laws of 1953, p. 644, and Rule 14 of Division of Welfare is in accord with statute and rule and is proper.



November 22, 1954

Honorable Harry Keller
Representative, Ninth District
1301 East Armour
Kansas City, Missouri

Dear Sir:

This department is in receipt of your recent request for a legal opinion which reads as follows:

"Can the state welfare department compel an applicant for old age assistance to sell an insurance policy in order to be granted aid?

"In the instant case the applicant and a daughter make premium payments jointly and have been doing so for the last 18 years. The insurance policy has a cash surrender value of perhaps more than \$600, but the daughter has declined to give up her share of the policy. As a result the welfare department has taken the mother off of old age assistance.

"It is my belief the 67th General Assembly remedied such conditions. I would like to know if the welfare department now has authority to take the action it did in this case. If so, then I want to be prepared to remedy the situation in the next session."

We understand the inquiry to be in regard to whether or not the lady referred to was qualified under the applicable statutes to receive old age assistance benefits.

Sections 208.010 and 208.011, RSMo 1949, as amended by Laws of Missouri, 1951, pages 758 and 759, were repealed and a new section enacted known as Section 208.010, Laws of Missouri, 1953, page 644. This section prescribes the eligibility requirements for public assistance, including old age assistance, and reads

Honorable Harry Keller

as follows:

"Eligibility for public assistance--means test.-- In determining the eligibility of a claimant for public assistance under this law, it shall be the duty of the Division of Welfare to consider and take into account all facts and circumstances surrounding the claimant, including his earning capacity, income and resources, from whatever source received, and if from all the facts and circumstances the claimant is not found to be in need, assistance shall be denied. The amount of benefits when added to all other income, resources, support and maintenance shall provide such persons with reasonable subsistence compatible with decency and health in accordance with standards developed by the Division of Welfare. In determining the need of a claimant in federally aided programs, such amounts per month of earned income shall be disregarded in making such determination as shall be required for federal participation by the provisions of the Federal Social Security Act, or any amendments thereto. Irregular, casual, and unpredictable income received by a claimant from performing odd jobs shall be excluded in calculating income. Benefits shall not be payable to any person who:

(1) Has made, or whose spouse has made, a voluntary assignment, conveyance or transfer of property within five (5) years for the purpose of rendering himself or spouse eligible for benefits or for the purpose of increasing his or their need for benefits. Any person who has assigned, conveyed or transferred property without receiving fair and valuable consideration therefor within five (5) years preceding the date of the investigation shall be presumed to have made such assignment, conveyance or transfer for the purpose of rendering himself or spouse eligible for benefits or to increase his or their

Honorable Harry Keller

need for benefits. 'Fair and valuable consideration' as used herein shall not, for the purpose of this act, be construed to include past support, contributions or services rendered by a relative to a claimant:

(2) owns or possesses cash or securities in the sum of \$500.00 or more; provided, however, that if such person is married and not separated from spouse, he or they, individually or jointly, may own cash and securities of a total value of \$1000.00; and provided, further, that in the case of an aid to dependent children claimant the provisions of this subsection shall apply only to the cash and securities owned by the parent and child or children, who may own cash and securities of a total amount not to exceed \$1000.00, and not to other relatives with whom the child may reside;

(3) owns or possesses property of any kind or character, or has an interest in property, the value of which, as determined by the Division of Welfare, exceeds \$5000.00, or if married and actually living with husband or wife, if the value of his or her property, or the value of his or her interest in property, together with that of such husband or wife, exceeds said amount; provided, however, that in the case of an aid to dependent children claimant this limitation shall apply only to property owned by parent and child or children and not to other relatives with whom the child may reside;

(4) is an inmate of a public institution, except as a patient in a medical institution, or to any individual who is a patient in an institution for tuberculosis or mental diseases, or who has been diagnosed as having tuberculosis or psychosis and is a patient in a medical institution as a result thereof. An inmate of a public institution

Honorable Harry Keller

may, however, make application for such benefits, which, if granted, shall not begin until after he or she ceases to be an inmate;

(5) has earning capacity, income, or resources, whether such income or resources is received from some other person or persons, gifts or otherwise, sufficient to meet his needs for a reasonable subsistence compatible with decency and health."

In the case of Parks vs. State Social Security Commission, 160 S. W. (2d) 823, in determining whether or not an applicant is eligible for old age assistance, it was held that this application must be tested by all six of the disqualifying clauses of Section 9406, RSMo 1939. At l. c. 825, the Court said:

"Claimant's application for assistance must be tested not only by one of the disqualification clauses of section 9406 but all of them, including clause 6. Clauses 1 to 6 are all disqualifying clauses and are of equal weight and, if claimant is disqualified under any one of them, he is not entitled to old age assistance. Chapman v. State Social Security Commission, 235 Mo. App. 698, 147 S. W. 2d 157, 162."

Applying the legal principles laid down in the above cited case to the facts before us, it is our thought that an application for old age assistance must be tested by all five of the disqualifying clauses shown in subsections 1 to 5, inclusive, of section 208.010, supra. In the event the application fails to meet the requirements of one or more of said disqualifying clauses, then such applicant is disqualified from receiving old age assistance.

The compliance or noncompliance with all of the disqualifying clauses of Section 208.010, supra, is always a question of fact. The statutes require the Division of Welfare to make an investigation of all the facts in each case and determine if the applicant has sufficiently complied with the law to entitle him to old age assistance.

For the purposes of our discussion, it will be assumed that

Honorable Harry Keller

the applicant has complied with Section 208.010, supra, with the exception of Subsection 5, and that the applicant has not complied with Rule 14 of the Division of Welfare. Rule 14 provides as follows:

"A single individual owning insurance with a cash or loan value of \$500 or more will not be considered eligible for assistance on the basis of available resources. A husband and wife living together may own insurance in any combination with a total cash or loan value up to \$1000, except in General Relief cases in which a \$500 limitation will apply.

"When the claimant has deposited money with any individual, firm, or corporation as an advance payment for a funeral, the amount of money deposited under such a plan will be considered a resource in the same manner as the cash or loan value of life insurance policies."

Apparently the action of the Division of Welfare in taking applicant's name from the roll of eligibles and in denying her further old age assistance payments was for the reason that she had not complied with Subsection 5, 208.010, supra, and Rule 14.

The question might be raised as to the legality of Rule 14, supra, promulgated by the Division of Welfare. In answer to such question, we wish to state that Rule 13 of the Division of Welfare providing that a person who owns property not his residence, worth more than \$500, is not eligible for old age assistance, was held to be a valid one in an opinion of this department dated June 23, 1954, and rendered to Honorable Arkley W. Frieze, State Senator, Carthage, Missouri.

It is our thought that the reasoning of this opinion is equally applicable to Rule 14, supra, and can lead only to the conclusion that said Rule 14 is a valid one.

The facts given in the opinion request are incomplete, and although an attempt has been made in a later letter to clarify them, they are still lacking in essential details.

While the question posed in the opinion request has been framed in such a manner it is obvious that an opinion answering

Honorable Harry Keller

such question either affirmatively or negatively is expected, since we have not been given all the facts, we are not in a position to answer the inquiry in the manner expected. Therefore, our answer must of necessity be given in a modified or alternative form.

Your letter states that the daughter claims a one-half interest in a life insurance policy having a cash surrender value of \$600 with the Mother, because the daughter has paid one-half the premiums of the policy for the past several years. However, it is not stated that the policy names the Mother and daughter as the insured or that it contains a provision the Mother and daughter shall each pay one-half the premiums and that each shall own a one-half interest in the policy.

There is no evidence that the insurer had any knowledge or had given its consent to such an agreement between the Mother and daughter, and certainly in the absence of such evidence the insurer would not be bound by any such private agreement.

If the policy named the Mother only as the insured, then the Mother is the sole owner of the policy insofar as the insurance company is concerned, and under the terms of same she alone has the right to surrender said policy and collect the \$600 cash surrender value. Under such circumstances, the insurer would be legally bound to pay no one but the Mother as the lawful owner of the policy.

From the facts given above, it is assumed that the Division of Welfare made the investigation and determination required of it by law, which was to the effect that the applicant was not entitled to old age assistance. The determination was evidently reached upon the grounds that the applicant owns an interest in an insurance policy worth more than the maximum amount allowed, and has resources within the meaning of Subsection 5, Section 208.010, supra, and also the value of said interest was in excess of that provided by Rule 14, supra.

On the other hand, if the investigation disclosed that provisions of the insurance policy showed the interest of the applicant in same to be only one-half and the other one-half interest was owned by the applicant's daughter, and if it appeared that the interest of the Mother in said policy was her entire assets and worth only \$300, then her assets were of less value than that provided by the statute.

Honorable Harry Keller

CONCLUSION

It is the opinion of this department a determination of the State Division of Welfare that an applicant for old age assistance is legally ineligible, if based upon evidence the applicant was the owner of an insurance policy having a cash surrender value of \$600, which amount is in excess of the maximum allowed by Subsection 5, Section 208.010, Laws of 1953, page 644 and Rule 14 of the Division of Welfare is in accord with the provisions of the statute and rule, and is proper.

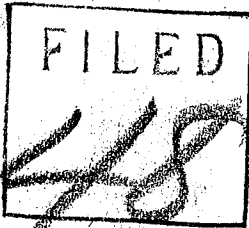
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General

PNC:DA

INTOXICATING LIQUOR:: A person may not manufacture intoxicating
: liquor for personal use in his home with-
LICENSE: : out obtaining the license and paying the
: fees required by Sections 311.180 or
: 311.190, RSMo 1949.
.....



December 14, 1954

Honorable Hollis M. Ketchum
Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Mr. Ketchum:

By letter dated October 25, 1954, you requested
an opinion of this office as follows:

"I have had several inquiries if a resi-
dent of Missouri may permit the natural
fermentation of fruit juices in the home
for the exclusive use of the occupants
of the home and their guests, tax-free
and without a license. It is my under-
standing, the Federal Government permits
200 gallons to be made per year, tax-
free, by the head of the family for home
use, so long as the respective State
Statutes do not prohibit same.

"May I have your official opinion if a
resident of the State of Missouri may
permit the natural fermentation of fruit
juices in the home for the exclusive use
of the home and the guests, tax-free and
without a license."

All statutory citations are Revised Statutes of
Missouri, 1949.

We presume that the "natural fermentation of fruit
juices" will result in intoxicating liquor, as defined
by Section 311.020. Said section reads:

"The term 'intoxicating liquor' as used
in this chapter, shall mean and include

Honorable Hollis M. Ketchum:

alcohol for beverage purposes, alcoholic, spirituous, vinous, fermented, malt, or other liquors, or combination of liquors, a part of which is spirituous, vinous, or fermented, and all preparations or mixtures for beverage purposes, containing in excess of three and two-tenths per cent of alcohol by weight."

Section 311.050 makes it unlawful to manufacture intoxicating liquor without a license. That section reads:

"It shall be unlawful for any person, firm, partnership or corporation to manufacture, sell or expose for sale in this state intoxicating liquor, as defined in sections 311.020, in any quantity, without taking out a license."

(Emphasis ours.)

A license to manufacture intoxicating liquor may be issued pursuant to Section 311.180 which reads:

"1. No person, partnership, association of persons or corporation shall manufacture, distill, blend, sell or offer for sale intoxicating liquor within this state at wholesale or retail, or solicit orders for the sale of intoxicating liquor within this state without procuring a license from the supervisor of liquor control authorizing them so to do. For such license there shall be paid to and collected by the director of revenue annual charges as follows:

"(1) For the privilege of manufacturing and brewing in this state malt liquor containing not in excess of five per cent of alcohol by weight the sum of two hundred dollars;

"(2) For the privilege of manufacturing in this state intoxicating liquor containing not in excess of twenty-two per cent

Honorable Hollis M. Ketchum:

of alcohol by weight the sum of one hundred dollars;

"(3) For the privilege of manufacturing, distilling or blending intoxicating liquor of all kinds within this state the sum of two hundred dollars;

* * * * *

"2. Provided further, however, that solicitors, manufacturers and blenders of intoxicating liquor shall not be required to take out a merchant's license for the sale of their products at the place of manufacture or in quantities of not less than one gallon."

The license fees for the manufacture of light wines under certain limitations are set out by Section 311.190. That section provides:

"For the privilege of manufacturing, in quantities not to exceed five thousand gallons, light wines containing not in excess of fourteen per cent of alcohol by weight exclusively from grapes, berries and other fruits and vegetables grown in the state of Missouri, there shall be paid to and collected by the director of revenue, in lieu of the charges provided in section 311.180, a license fee of five dollars for each five hundred gallons, or fraction thereof. A manufacturer licensed under this section shall be privileged to sell to consumers at the winery in lots not to exceed four and seven-eighths gallons, and to sell to duly licensed wholesalers or duly licensed retail dealers in lots of five gallons or more."

Honorable Hollis M. Ketchum:

The above statutes prohibit the manufacture of intoxicating liquors unless the manufacturer pays the required fees and is properly licensed. Persons manufacturing intoxicating liquors for their personal use are not exempted from the operation of the statute.

CONCLUSION

It is, therefore, the opinion of this office that a person may not manufacture intoxicating liquor for personal use in his home without obtaining the license and paying the fees required by Sections 311.180 or 311.190, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

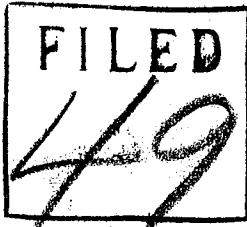
JOHN M. DALTON
Attorney General

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*on
Digest*

CHILDREN:
MISSOURI STATE HOSPITAL:

Illegitimate child born to inmate
of Missouri State Hospital is resi-
dent of county from which mother
was committed.



July 14, 1954

Honorable John C. Kibbe
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"An infant child was born in the State Hos-
pital at Fulton on April 28, 1954. I would
like to request your opinion as to the
responsibility for the care of this child.

"The mother of the child is, who was
fifteen years of age at the time of the in-
fant's birth. The parents of lived
in Moniteau County, but in February of 1953
the mother moved to Cooper County, taking
. . . . and the other children with her, and
instituted a divorce proceeding against Mr.
. . . ., who remained at the home in Moniteau
County.

"On September 17, 1953, was sent from
Cooper County to the State Hospital at Fulton,
where she has since remained, at the expense
of Cooper County.

"In January of 1954, was granted a
divorce on his cross bill in the Circuit
Court of Cooper County, and was awarded cus-
tody of the children, including who
was still in the State Hospital.

"On April 28, 1954,, unmarried, gave
birth to a baby boy, and mother and infant
are both still in the State Hospital.

Honorable John C. Kibbe

"Dr. Gremer asks that either Moniteau or Cooper County take this infant. Cooper County officials contend that the infant is the responsibility of Moniteau County, by virtue of the divorce decree awarding the custody of to her father, a resident of Moniteau County. We contend, in line with a recent opinion by your office, that the residence of remains the same while she is in the State Hospital, and that the residence of the infant must be that of the mother; in other words that the residence of cannot be affected by the divorce decree while she is in the State Hospital. Since Cooper County has never questioned its responsibility for, we feel that the same should be true as to the infant child. I might add that the father of is not able to take care of the infant, so that the expense of its care must ultimately devolve upon the state.

"Who is responsible for the care of this infant child? The identity of the infant's father is unknown.

"The county court of this county would appreciate your opinion on this matter at your convenience."

It is our thought that the question which you have proposed is answered by a prior opinion of this department delivered under date of May 10, 1954 to the Honorable Harry J. Mitchell, Prosecuting Attorney, Marion County. A copy of that opinion is enclosed as we feel that the reasoning contained therein should serve to answer the problems arising out of the birth of the child in the circumstances outlined in your letter.

One further matter should perhaps be discussed in view of the divorce proceedings had in the Circuit Court for Cooper County, by virtue of which the custody of the minor child who is the mother of the illegitimate son was transferred by that court to her father, a resident of Moniteau County. It might be thought that such action would have the effect of imposing liability for the support of the illegitimate child upon Moniteau County. In this regard we direct your attention to the provisions of Section 202.100 RSMo 1949, reading as follows:

Honorable John C. Kibbe

"No person shall be entitled to the benefit of the provisions of this chapter as a county patient, except persons whose insanity has occurred during the time such person may have resided in the state, and except the insane poor under sentence as criminals, as provided in sections 546.510 to 546.540, RSMo 1949. Every patient in a state hospital shall be deemed to be the county patient of the county first sending him until one year after his regular discharge from the hospital." (Underscoring ours.)

Following the reasoning in the prior opinion attached hereto with respect to the residence of a minor child following that of the parent, we believe that this statute continues the residence of the mother of the illegitimate son in Cooper County from whence she was first committed for a period extending at least until one year after her regular discharge from the State Hospital. Such county is therefore liable for the support of the infant, if required by law.

CONCLUSION

In the premises we are of the opinion that an illegitimate child born to an inmate of a Missouri State Hospital is a resident of the county from which such inmate was first committed. It is our further opinion that proceedings having for their purpose the supervision and control of the custody of such illegitimate child should properly be initiated in the county from which the mother was originally committed.

It is our further opinion that if such child is a "pauper" within the meaning of the law, to whom public assistance is to be given, such county is liable therefor.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

Enclosure: 5-10-54 to Harry J. Mitchell

ELECTIONS--Absentee
ballots--where notarized.



Affidavits to absentee ballots may be taken by Notaries Public in the county for which the Notary is appointed and adjoining counties by the terms of Sec. 486.010, V.A.M.S. 1949, and are not confined to the office of a Notary taking such affidavits. A Notary Public cannot take his or her own affidavit to an absentee ballot if he or she is the absent voter.

September 10, 1954

Honorable J. H. Kramer
Representative, Osage County
Linn, Missouri

Dear Mr. Kramer:

This will be the opinion you requested from this office asking our construction of the statutes of this state authorizing the notarization of absentee ballots of an absent voter who is a qualified elector in this state, particularly as to the authority of a Notary Public to notarize such ballots, and, if a Notary Public has authority to notarize such ballots does such Notary have the authority to do so in any place in a county, or is he confined to his own office in the performance of such duties. Your letter requesting an opinion on these questions reads as follows:

"I would like to know whether or not a candidate who is a notary public can lawfully notarize absentee ballots.

"I would also like to know whether he has the authority to do this any place in the county or is he confined to his office?"

Chapter 112, V.A.M.S. 1949, permits a qualified elector of this state, other than a person in military or naval service, to vote an absentee ballot when he or she expects to be absent from the county in which he or she is a qualified elector on the day of an election named in Section 112.101 of said Chapter, or who may from illness or physical disability be prevented from personally going to the polls to vote.

Section 112.050 of said chapter provides, among other things, that: "The absent voter shall make and subscribe to the affidavits provided for on the return envelope for the ballot before any

Hon. J. H. Kramer

officer authorized by law to administer oaths; * * *."

Notaries Public may, among other privileges and duties which they are authorized to perform, as prescribed by statute, take affidavits or affirmations. Section 486.020, defining the powers and duties of Notaries Public under Chapter 486, V.A.M.S. 1949, including such authority, reads, in part, as follows:

"They may administer oaths and affirmations in all matters incident or belonging to the exercise of their notarial offices. * * *"

We have observed from the terms of the statute hereinabove noted that the qualified elector as an absent voter is required to make the affidavit provided for on the return envelope containing his or her ballot before any officer authorized by law to administer oaths. We have also seen from the terms of said Section 486.020 that Notaries Public may administer oaths and affirmations. These statutes themselves provide no exceptions or exemptions among officers to withhold from them the power to administer oaths because they are candidates for office or for any other reason. Such officers are given unlimited power and authority by statute to administer oaths and affirmations. That power is not affected in anywise by such officer being a candidate for public office or otherwise.

Considering the terms of the statutes quoted, supra, it is the opinion of this office, answering your first question, that a Notary Public who is a candidate for public office may lawfully take the affidavits of all absentee ballots submitted to him or her for such purpose and fully notarize the same, except his own ballot, in case he is an absent voter. We do not believe a Notary Public or any other officer authorized to administer oaths or to take acknowledgments may lawfully administer an oath or take an affidavit or take an acknowledgment to any instrument in writing in any proceedings where he or she has an interest as a party therein or thereto.

We have observed from the terms of the statutes so quoted that a notary public may legally notarize the absentee ballot of an absentee voter, other than his or her own ballot, if such absentee voter is a candidate. This opinion, however, is passing only on and approving the legality of such notarizations and not the propriety of such action by a candidate. In order to avoid complications and embarrassments of any character it would be best for a candidate, if a notary public, not to notarize absentee ballots of absent voters.

Hon. J. H. Kramer

We are enclosing a copy of an opinion issued by this office to Honorable Harry P. Rosecan, Prosecuting Attorney, City of St. Louis, Missouri, dated November 21, 1934, holding that a Notary Public is disqualified from performing official acts in which he has any personal or beneficial interest. We believe said opinion of said date will aid in the clarification of the questions here being considered as to the exercise of powers by Notaries Public granted to them by statute.

Considering your second question as to whether a Notary Public is required to remain in his office in the performance of his official privileges and duties, especially with respect to taking affidavits to absentee ballots, or whether he has authority to perform such duties, including the taking of such affidavits in any place in the county, we refer you to the provisions of Section 486.010, V.A.M.S. 1949, on the subject of Notaries Public. That section provides in express terms that the territory in which a Notary Public is authorized to act, includes the county for which he may be appointed and adjoining counties. Said section so providing reads, in part, as follows:

"The governor shall appoint and commission in each county and incorporated city in this state, as occasion may require, a notary public or notaries public, who may perform all the duties of such office in the county for which such notary is appointed and in adjoining counties. * * *."

This section provides, as will be observed, that any and all of the duties of the office of Notary Public may be performed by the Notary in such counties as are specified therein.

By the terms of said Section 486.010, a Notary Public is not confined to his office in the performance of the privileges and duties which pertain to his office. He is authorized by said section to perform such duties in his own and in adjoining counties.

CONCLUSION

Considering the premises, it is the opinion of this office that:

1. A candidate who is a Notary Public can lawfully notarize absentee ballots of absent voters except his own in case he or she is the absentee voter making the affidavit.

2. It is the further opinion of this office that a Notary Public has the authority to notarize absentee ballots any place in the county and is not confined to his office in so doing.

Hon. J. H. Kramer

3. It is the further opinion of this office that, while it is legal for a candidate for office, who is a notary public, to take the affidavits of absentee voters to absentee ballots; yet, in order to avoid improprieties and embarrassments of any character, it would be best for him or her not to do so.

The foregoing opinion which I hereby approve, was prepared by my assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON
Attorney General

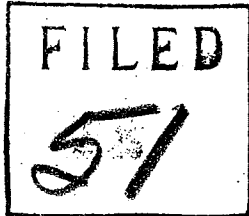
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Enc.

COUNTY BUDGET:

ROAD AND BRIDGE:

POOR PERSONS:

1. Surplus money received by a county treasurer from farmer donations under the County Aid Road Fund Act may not be placed in the road and bridge fund of the county but should be distributed to farmer contributors in proportions of the amount donated.
2. County court may in its discretion under conditions herein stated provide mild entertainment for poor persons at county poor farm.
3. County court may transfer fund from Class 1, 2 and 4 into Class 5 prior to the end of the year under certain conditions.



January 11, 1954

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"I request that your office render an opinion on three problems concerning county government.

"1. Our County Treasurer has been accepting the farmer donations under what is commonly called the King Bill Road aid program. When this money is disbursed along with the State aid, the County Treasurer often has amounts ranging from 2 cents up to as much as \$250 remaining in his hands. He is anxious to know whether or not it would be possible for him to transfer this money into the Road and Bridge Fund of the county.

"2. The County Court has been leasing what was formerly the poor farm to an individual who is now operating a private nursing home there. The lease agreement provides that the nursing home shall take care of the county's indigent persons for their pensions. The County Court wishes to know whether or not it is proper for them to make donations for the entertainment of these indigent patients along with private patients who may be in the nursing home.

Hon. Alden S. Lance

"3. The County Court also wishes to know whether or not they can transfer funds from Classes 1, 2 and 4 into the Class 5, the Contingent Fund, as needed during the year, or whether they must wait until the end of the year to make such transfers.

"An early opinion on the above three questions will be appreciated. A copy of this request is being sent to the Chief Auditor."

We shall answer the various inquiries contained in your request in their numerical order.

The General Assembly enacted what has commonly been referred to as the County Aid Road Fund Act, Sections 231.440, 450.470 & 490, V.A.M.S. Said fund was appropriated from part of the Missouri post-war fund for the purpose of aiding and assisting in the improvement, construction and restoration of county roads.

It provides under Section 231.450, supra., that the State Highway Commission and a committee of five county judges selected by the Governor which formulate general plans for the administration of the program under the foregoing statutes and furthermore requires said committee to take into consideration certain specific things in so formulating plans.

Under Section 231.470, supra., any county court desiring to become the recipient of benefits under this program is required to formulate a program for the improvement and construction of county roads and when prepared should be submitted to the State Highway Commission for approval. If such program meets with the provisions of the foregoing statutes, it should be approved by said highway commission whereupon the committee shall notify the State Comptroller, who shall certify his approval to incurring such obligation and who shall incur the funds appropriated to such county and such project, which amount shall not exceed two-thirds of the total costs of said project. Section 231.480 merely authorizes the county court to let the contract for such work.

Hon. Alden S. Lance

Under Section 231.490 supra., the State Highway Commission must approve the construction work upon its completion. If it is approved, then the committee is required to notify the comptroller who shall certify for payment a warrant drawn upon the state treasurer payable to the county treasurer. It further provides that payments thereon may be made as work progresses and such payments should be made in the same manner as provided upon the completion of said project.

Under Section 231.495, the Legislature has provided for additional benefits; however, the county must also spend a like amount for the same purpose.

No where in said act does it provide for farmer donations; however, it does require the county court to pay its proportionate share as provided therein. We understand that it is the general procedure for county courts to solicit donations from farmers who are anxious to obtain such benefits and maintenance of said county roads. In view of the absence of any specific statutory authority for obtaining farmer donations, naturally there is no statutory provision for the distribution of any surplus funds donated by farmers after payment of all costs.

Therefore, we are of the opinion that in case there is a surplus of farmer donations after payment of all costs of construction under the contract, that same cannot be classed as county or state revenue and the surplus should be returned to the respective farmers in proportion to the amounts donated.

You state that the County Poor Farm has been leased to an individual for a private nursing home at said poor farm under a lease agreement with the county which provides that said lessee shall take care of county indigent persons for their pensions. The question is, would it be proper and legal for the County Court to provide some entertainment for these indigent persons along with private patients in the home.

While your request refers to county indigent persons, we are assuming for the sake of this opinion only that you have reference to what is designated in the statutes as poor persons. The statutory definition of poor persons is as follows:

"205.590. Who deemed poor. -- Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and

Hon. Alden S. Lance

when there are no other persons required by law and able to maintain them, shall be deemed poor persons."

It is the duty of the County Court to take care of indigent persons as provided under Section 205.580, 590, 600 and 610, RSMo 1949. State Ex rel. Gilpen, et al v. Smith, 96 SW (2d) 40, 1.c. 41. (See also Section 205.660 and 670, RSMo 1949.)

Certainly if benefits under the Social Security Act in the form of Old Age Assistance is all that any of the poor persons have, with no other means of support, then most likely they come within the classification of poor persons as hereinabove designated and it becomes the duty of the county court to furnish them support. If it is determined that such persons do have support and money from such benefits and other income and assistance to adequately support them, then of course they cannot be considered poor persons.

While the county court has leased the county poor farm to an individual, consideration for such lease being that said individual will take care of the county indigent persons for their pensions and as a further consideration, he may also have private patients, this does not necessarily mean that the county court may not supplement this by providing additional support over and above the bare necessities of life.

We believe this does not come within the constitutional provision of allowing additional benefits over and above that provided by said lease or contract with this individual as prohibited under Section 39, Sub-section 3, Article III, Constitution State of Missouri. Since this is in no manner additional remuneration to the lessee of said poor farm but is for the benefit of such poor persons.

Therefore, we are of the opinion that the county court may in the exercise of its discretion furnish limited form of entertainment for such poor persons. If merely by reason of the fact private patients are in the home they also enjoy such entertainment at no additional costs to the County, then we can see no reason why this cannot be permitted. Of course, if the form of entertainment requires additional costs for private patients, then it would be illegal to furnish such

Hon. Alden S. Lance

private persons with this entertainment.

Replying to your third inquiry, Class 5 under Section 50.710, RSMo 1949, refers to the classification of estimated expenditures of the county and reads:

"Class 5. Contingent and emergency expense.--
The county court may transfer any surplus funds from class one, two, three, and four to class five to be used as contingent and emergency expenses. Purposes for which the court proposes the funds in this class shall be used shall be shown.

This department has ruled that in counties of Third Class, funds in Class 1, 2 and 4, may be transferred to Class 5 at the end of the fiscal year under certain conditions, see attached copy of opinion rendered to Hon. J. W. Wight, County Judge, Randolph County, Missouri, under date of February 4, 1944. We are enclosing a copy of an opinion rendered by this department to Hon. Wayne V. Slankard, Prosecuting Attorney, Newton County, Missouri, under date of November 21, 1938, holding that if it can be determined with reasonable certainty that after the transfer is made there will be sufficient funds remaining in said classes to carry out the terms of the Budget Act without jeopardizing the priority of payments, then funds may be transferred from such classes to another class before the close of the year. In view of this opinion, if all outstanding and future obligations can be determined with some degree of accuracy and said obligations can be paid from funds remaining in Classes 1, 2 and 4 after the proposed transfer to another class, then we believe that funds in such classes may be transferred to Class 5 before the end of the year.

CONCLUSION

It is the opinion of this department that:

1) Surplus funds received by the county treasurer as farmer donations under the County Aid Road Act must be distributed to the respective farmers that contributed such funds in proportion to their contributions and that such funds may not be placed in the Road and Bridge Fund of the county.

Hon. Alden S. Lance

2) That the county court may in the exercise of its discretion provide some mild form of entertainment for poor persons being cared for at the county poor farm by a lessee of said farm. However, such entertainment cannot be provided for private persons of said poor farm if it would entail additional costs by the county.

3) The county court may transfer funds from Class 1, 2 and 4 into Class 5 prior to the end of the year provided it can be determined with some degree of accuracy, that after the transfer is made there will remain in Class 1, 2 and 4 sufficient funds to carry out the terms of the Budget Act without jeopardizing the priority of payments.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

ARH :sm

MOTOR VEHICLES: : A person who is not a farmer may use a "local
: commercial motor vehicle" within the meaning
LICENSE FEES: : of Section 301.010, et seq., to haul freight
: for hire so long as such activities are con-
: fined to a municipality and an area extending
: not more than twenty-five miles therefrom.
.....



November 23, 1954

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Mr. Lance:

By your letter of November 19th, 1954, you re-
quested an opinion of this office as follows:

"In your opinion dated February 20, 1953,
concerning local commercial motor vehicles,
I note that Paragraph '2' of your conclusion
states that 'a farmer operating on a local
commercial motor vehicle license may not
make a for hire haul.' This opinion was
rendered in connection with Section 301.010,
R.S. Mo. 1949, Paragraph '10', which defines
a local commercial motor vehicle.

"I would like an opinion from your office as
to whether or not this definition of a local
commercial motor vehicle would permit a per-
son not a farmer to haul for hire on a local
license where his activities were confined
to a municipality or to a municipality and
that area extending not more than 25 miles
therefrom. Since the definition states 'a
commercial motor vehicle whose operations
are confined solely to a municipality and
that area extending not more than 25 miles
therefrom', I would assume that a person
not a farmer would be able to haul for hire
so long as his activities were confined to
a municipality and an area extending not
more than 25 miles therefrom; but it has
been discussed considerably in my county,

Honorable Alden S. Lance:

and I would like an opinion from your office to clarify the situation."

This office rendered on February 20, 1953, an opinion to Honorable D. W. Sherman, Jr., Prosecuting Attorney of Lafayette County, wherein it was concluded:

"(1) That a farmer operating his truck on a local commercial motor vehicle license may travel beyond the twenty-five mile limit when he has no load on his truck and is on a pleasure trip.

"(2) That a farmer operating on a local commercial motor vehicle license may not make a 'for hire haul.'

"(3) That a man, not a farmer, operating on a local commercial motor vehicle license, may not go beyond the twenty-five mile limit on a pleasure trip.

"(4) That a person, not a farmer, operating on a local commercial motor vehicle license, may not legally move from job to job in excess of the twenty-five mile limit."

Section 301.060, (all statutory citations herein are RSMo Cumulative Supplement of 1953), sets forth the annual registration fees for various motor vehicles. That section is too long to quote. It is sufficient to say that the fees for local commercial motor vehicles are considerably lower than the fees for commercial motor vehicles. Local commercial motor vehicle license plates differ from commercial motor vehicle license plates. Section 301.030.

A "commercial motor vehicle" is defined by Section 301.010, (1) as follows:

"(1) 'Commercial motor vehicle,' a motor vehicle designed or regularly used for carrying freight and merchandise, or more than eight passengers;"

Honorable Alden S. Lance:

A "local commercial motor vehicle" is defined by Section 301.010 (10) to be:

"(10) 'Local commercial motor vehicle,' a commercial motor vehicle whose operations are confined solely to a municipality and that area extending not more than twenty-five miles therefrom; or a commercial motor vehicle whose property carrying operations are confined solely to the transportation of property owned by any person who is the owner or operator of such vehicle, to or from a farm owned by such person or under his control by virtue of a landlord and tenant lease; provided that any such property transported to any such farm is for use in the operation of such farm;"

Reading the first clause of Paragraph 10 of Section 301.010 in conjunction with Paragraph 1 of that section, gives the following definition of a local commercial motor vehicle: "A motor vehicle designed or regularly used for carrying freight and merchandise, or more than eight passengers, whose operations are confined solely to a municipality and that area extending not more than twenty-five miles therefrom."

This clearly indicates that a person not a farmer may "haul for hire" within the prescribed area.

CONCLUSION

It is, therefore, the opinion of this office that a person who is not a farmer may use a "local commercial motor vehicle" within the meaning of Section 301.010 et seq., to haul freight for hire so long as such activities are confined to a municipality and an area extending not more than twenty-five miles therefrom.

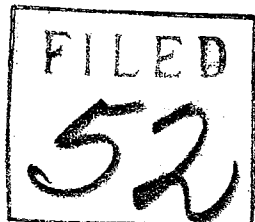
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:vlw;irk

INSURANCE: Articles of Incorporation of The National
Bellas Hess Life Insurance Company.



January 18, 1954

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

Pursuant to your request of January 13, 1954, a review has been made of an executed copy of Articles of Agreement of original incorporators of the proposed The National Bellas Hess Life Insurance Company.

It is the opinion of this office that the Articles of Agreement of original incorporators of The National Bellas Hess Life Insurance Company comply with the provisions of Sections 377.200 to 377.460 RSMo 1949.

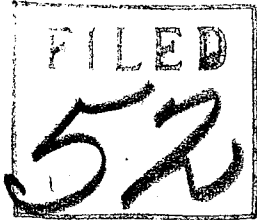
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly

JLQ'M/ld

JOHN M. DALTON
Attorney General

INSURANCE: Articles of Incorporation of New Empire
Insurance Company.



January 18, 1954

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

Pursuant to your request of January 6, 1954, a review has been made of an executed copy of Articles of Agreement of original incorporators of the proposed New Empire Insurance Company.

It is the opinion of this office that the Articles of Agreement of original incorporators of New Empire Insurance Company comply with the provisions of Sections 377.200 to 377.460 RSMo 1949.

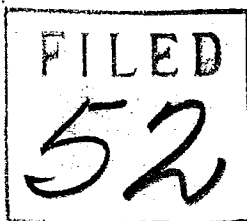
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly

JLO'M/ld

JOHN M. DALTON
Attorney General

INSURANCE: Section 376.360, RSMo 1949, relative to annual distribution of dividends on participating policies, applies to foreign life insurance companies licensed in Missouri.



March 15, 1954

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

The following opinion is rendered in reply to your request which may be restated in the following language:

Are the mandatory provisions of Section 376.360, RSMo 1949, which provide for the annual distribution of dividends apportioned to participating policies issued by life insurance companies, applicable to a foreign life insurance company licensed to conduct its business in this State?

For the purpose of this opinion it is not necessary to incorporate herein more than paragraphs numbered 1 and 6 of Section 376.360, RSMo 1949, a statute of unusual length, which paragraphs provide:

"1. All life insurance companies organized under the laws of this state shall ascertain and distribute annually, and not otherwise, beginning not later than the end of the third policy year, the proportion of any surplus accruing

Honorable C. Lawrence Leggett

upon every participating policy or contract issued on or after January 1, 1946, entitled as herein provided to share in such surplus. Upon the thirty-first day of December of each year, or as soon thereafter as may be practicable, every such company shall well and truly ascertain the surplus earned by it during the year.

* * *

"6. No stock or stock and mutual life insurance company organized under the laws of this state shall issue, on or after January 1, 1946, any participating policy or contract which does not by its terms give the right to participate in the divisible surplus earnings of such company as provided herein. No mutual life insurance company organized under the laws of this state shall issue, on or after January 1, 1946, any policy or contract, except as herein provided, which does not by its terms give the right to participate in the divisible surplus earnings of such company as provided herein. * * *

In the two above quoted provisions from Section 376.360, RSMo 1949, it is readily apparent that a positive legislative policy is stated and directed to all life insurance companies organized under the laws of Missouri and which are subject to said statute. Does the fact that language of the statute, on its face, is addressed to domestic life insurance companies justify a contention that life insurance companies of a foreign state, licensed to do business in Missouri, are not subject to its provisions? Such question should receive a negative answer when we consider the following language found in Section 375.030, RSMo 1949, a statute applicable to all foreign life insurance companies licensed to transact business in Missouri:

"1. No individual or association of individuals, under any style or name, shall be permitted to do the business mentioned in this chapter within the state of Missouri, unless he or they shall first fully comply with all the provisions of the laws of this state governing the business of insurance. * * "

Honorable C. Lawrence Leggett

In passing upon the applicability of local laws to foreign insurance companies conducting their business in Missouri, the Supreme Court of Missouri spoke as follows in the case of Head v. Insurance Company, 241 Mo. 403, l.c. 413:

" * * * that foreign insurance companies admitted to carry on their business in this State, can only contract within the limits prescribed by our statutes, and that in the conduct of the business under the license granted by this State, they 'shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers.' * * *."

In referring to the decisions of Missouri's appellate courts in relation to the applicability of Missouri's laws to foreign insurance companies, the Court's opinion in the above cited case continued as follows at 241 Mo. l.c. 413:

"The effect of these decisions is to write into every insurance contract made by a foreign insurance company, so licensed, in this State all of the provisions of the statutes of this State appurtenant to the making of such contract, and which define and measure the reciprocal rights and duties of the parties thereto. These statutes are declaratory of the public policy of this State, and inhibit the doing of the business of insurance in this State by any corporation contrary to their regulations by annulling all the stipulations which offend the provisions of the statutes. * * *"

No ambiguity has been discovered in the language of Section 376.360, RSMo 1949, which provides for the annual payment of dividends accruing and declared upon participating policies, and payment of such dividends on a five-year basis is not contemplated or authorized by the statute.

CONCLUSION

It is the opinion of this office that the mandatory provisions of Section 376.360, RSMo 1949, which provide for the

Honorable C. Lawrence Leggett

annual distribution of dividends apportioned to participating policies issued by life insurance companies are applicable to foreign life insurance companies licensed to conduct their business in this State.

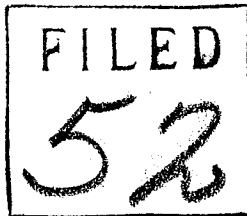
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO:M:lw

INSURANCE: Articles of Incorporation of American
Transportation Insurance Company



March 24, 1954

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of March 22, 1954, an examination has been made of an executed copy of the original Articles of Incorporation, together with proof of publication of the same, to form an insurance company to be known as American Transportation Insurance Company.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160, RSMo. 1949, and not inconsistent with the constitution and laws of this State and of the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M/vtl

INSURANCE: Certificate No. 63955 of The W. H. Irby Burial Association constitutes an insurance contract, and offering of the same in the state of Missouri without meeting the requirements of the Missouri Insurance Code is an offense under Section 375.310, RSMo 1949.



June 8, 1954

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

The following opinion is rendered in reply to your request reading as follows:

"You will find inclosed a certificate issued by the Russell-Ermert Burial Association (successors to the captioned Association) in Butler County, Missouri.

"This is to request an official opinion from your office as to whether or not the inclosed document constitutes an insurance policy under the laws of this State. Further, does the issuance of the certificate by agents in this State constitute engaging in unauthorized insurance business under the applicable laws of the State?

"Please return the inclosed certificate when it has served your purpose."

Certificate No. 63955 dated April 29, 1948, issued by the W. H. Irby Burial Association to Mary C. Biggs reads as follows:

"This certificate is valuable and should be kept in a safe place. Receipts of payment of assessment Should also be kept with the certificate as proof of payments.

Certificate No. 63955

Honorable C. Lawrence Leggett

THE W. H. IRBY BURIAL ASSOCIATION
Rector, and Corning, Arkansas

This is to certify that Mary C. Biggs having paid the required membership fee, and having designated and elected to take burial benefit Class Special not exceeding \$500.00 and further qualified by promising to be loyal to said Association and to be governed by its by-laws, is entitled to his

CERTIFICATE OF MEMBERSHIP

in the W. H. Irby Burial Association of Rector and Corning, Arkansas and to all the benefits of the association as set forth in the by-laws so long as he shall remain a member thereof.

In witness whereof the signature of the Secretary-Treasurer is hereunto affixed at Rector, Arkansas this 29 day of April 1948.

/s/ W. H. Irby
Secretary-Treasurer"

Section 375.310, RSMo 1949, provides, in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * *."

In State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 165 S.W. 1084, 257 Mo. 529, l.c. 535, the Supreme Court of Missouri spoke as follows:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the

Honorable C. Lawrence Leggett

promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, l.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him.'"

In the case of State ex inf. v. Black, 145 S.W. (2d) 406, 347 Mo. 19, l.c. 24, the insurance character of burial associations was alluded to in the following language:

"The insurance character of this business is recognized by the provision of the act exempting such associations from the general insurance laws."

The insurance character of burial associations is also attested by the following language found in Section 376.020, RSMo 1949, of Missouri's regular life insurance company law:

" * * * provided, that any association consisting of not more than one thousand five hundred citizens, residents of the state of Missouri, all living within the boundaries of not more than three counties in this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each member, to be given to a beneficiary or beneficiaries named by the deceased member in his or her certificate of membership, said certificate of membership to

Honorable Lawrence C. Leggett

be issued by such association, shall not be construed to be life insurance company under the laws of this state, * * *."

At 44 C.J.S., Insurance, Sec. 27, we find the subject of burial benefit treated as follows:

"'Burial benefit' or 'funeral benefit' has been regarded as life insurance."

In the footnote to the texts of C.J.S., just quoted, we are cited to the case of State ex rel. Reece v. Stout, 17 Tenn. App., 65 S.W. (2d) 827, in which case the following language is found at 65 S.W. (2d) 827, l.c. 829:

"Burial or funeral benefit, being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance. Such a contract has, however, been held void as against public policy and in restraint of trade, where, although the purpose of the association was to provide, at their death, a funeral and proper burial for the members, the association was organized on the mutual plan, the members contributing a stipulated sum weekly, and the funeral, certain funeral furnishings, and outfit were to be furnished, by and through a designated undertaker, or official undertaker."

In the case of Knight v. Finnegan (D.C. Mo.), 74 F. Supp. 900, the Court, in the course of defining life insurance, spoke as follows at 74 F. Supp. 900, l.c. 901:

"Moreover, the elements and requisites of an insurance policy are, among others, 'a risk of contingency insured against and the duration thereof.' 'A promise to pay or indemnify in a fixed or ascertainable amount.'"

Rules and by-laws of the W. H. Irby Burial Association of Rector and Corning, Arkansas are made part of Certificate No. 63955 issued to Mary C. Biggs and comprised of fourteen separate paragraphs. A review of these rules and by-laws cause this certificate to be brought squarely within the ruling in State v.

Honorable C. Lawrence Leggett

Black, which is cited above, and it is not deemed necessary to discuss any particular rule or by-law of the association which causes Certificate No. 63955 to be denominated a contract of insurance.

CONCLUSION

It is the opinion of this office that Certificate No. 63955 dated April 29, 1948, issued by the W. H. Irby Burial Association of Rector and Corning, Arkansas to Mary C. Biggs constitutes a contract of insurance, and offering the same in the state of Missouri without meeting the requirements of Missouri's laws relating to organization and regulation of insurance companies will cause persons so offering such certificate to be subject to the penalties prescribed by 375.310 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M/vtl

INSURANCE: Premium tax provided for in Section 148.340 RSMo
TAXATION: 1949 is to be levied against foreign fraternal
benefit societies which have reincorporated as
legal reserve, level premium life insurance companies, only
to the extent that the contracts remaining in force, or issued
by such reincorporated companies, are devoid of assessment
liability.

June 17, 1954



Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

The following opinion is rendered in reply to your inquiry
reading as follows:

"The Homesteaders Life Company of Des Moines, Iowa, and the Security Benefit Life Insurance Company of Topeka, Kansas, both operated as Fraternal for a long period of years, during which time they were licensed to do business in this State, however, about four years ago they reincorporated as Legal Reserve life insurance companies without any fraternal benefits other than those specified in the original membership contract and, of course, they had a considerable volume of fraternal business on which they continued to collect premiums.

"Since the change was made, we have been unable to collect any premium tax inasmuch as we assessed the Companies on the total amount of premium received. On the other hand, the Companies claim that all premium received from the fraternal contracts are exempt under the Missouri Insurance Laws.

Honorable C. Lawrence Leggett

"We are handing you herewith our entire file relative, together with an Opinion of the Attorney General of Illinois who filed suit to collect tax based on the fraternal premium income of the two companies named above as well as other companies and, if the writer remembers correctly, all the companies named in their suit are doing business in this State at the present time.

"We would appreciate an opinion as to whether or not the tax is to be levied on the entire premium income of the Companies or only on the business written since reincorporation."

Facts before us disclose that the two companies involved, prior to their reorganization, operated in their respective States and in Missouri, as fraternal benefit societies having a lodge system with ritualistic form of work; that such companies since reorganization carry on an insurance business as legal reserve, mutual, level premium life insurance companies, and continue to be licensed in Missouri. In this opinion we must determine if Missouri's premium tax statute, Section 148.340 RSMo 1949, is to be applied to consideration received by the two companies on contracts still in force in Missouri but written prior to reorganization, and the character of new policies must also be comprehended. Section 148.340 RSMo 1949, provides:

"Every insurance company or association not organized under the laws of this state, shall, as provided in section 148.350, annually pay tax upon the direct premiums received, whether in cash or in notes, in this state or on account of business done in this state, for insurance of life, property or interest in this state at the rate of two per cent per annum in lieu of all other taxes, except as in sections 148.310 to 148.460 otherwise provided, which amount of taxes shall be assessed and collected as herein provided; provided, that fire and casualty insurance companies or associations shall be credited with canceled or return premiums

Honorable C. Lawrence Leggett

actually paid during the year in this state, and that life insurance companies shall be credited with dividends actually declared to policyholders in this state, but held by the company and applied to the reduction of premiums payable by the policyholder."

No tax under the above quoted statute was levied against the two companies involved prior to their reorganization since such a tax was not levied against domestic fraternal benefit societies. Insofar as Section 148.340 RSMo 1949 is applied to "premiums received," by a foreign insurance company doing business in Missouri, as distinguished from "assessments" touching policies written by a foreign insurance company, the Supreme Court of Missouri in the case of Bankers' Life Co. v. Chorn, 186 S.W. 681, 1.c. 684, spoke as follows:

"* * * Having in mind this intrinsic distinction between the purpose and object of the section under review (R.S. 1909, Sec. 7099) this court, in banc, in the decision referred to, decided that the Legislature, in imposing this duty of 2 per cent. upon the 'premiums' received by foreign insurance companies, merely exercised its power 'to impose a license or occupation tax on insurance companies'; and hence the enactment for that purpose became properly part and parcel of the special code provided by our law for regulating the business of foreign and domestic insurance, and that the terms of the act disclosed, however, that it was only applicable to companies insuring for fixed or level premiums, and not to those doing business on the assessment plan. * * *" (Underscoring supplied.)

In dealing with this particular tax statute the Supreme Court of Missouri in Young v. Life Insurance Co., 277 Mo. 694, 1.c. 699, spoke as follows:

"No such tax was demandable, under the statutes and decisions of this State, by any company doing business on the assessment plan."

Honorable C. Lawrence Leggett

The two cases cited above involving, as they did, a construction of language now found in Section 148.340 RSMo 1949, clearly indicate that the statute is not to be directed to a foreign company's income derived from assessments levied against holders of insurance contracts, but will only affect premium income of such companies growing out of fixed, level premium charges, which may not be further increased by an assessment of any kind. The contracts issued and outstanding by the two companies involved are the best evidence of their character as assessment or level rate and non-assessable contracts. In this opinion we do not undertake to construe the terms of any particular contracts issued or to be issued by the companies.

In view of the construction placed by the Supreme Court of Missouri on language found in Section 148.340 RSMo 1949, we feel that the principal inquiry is best disposed of by resting a ruling on the character of the contract issued, rather than to take a circuitous route exploring the reincorporation of the fraternal benefit societies into legal reserve, level premium life companies and then attempting to exempt their former assessment contracts on the theory that their terms have not been changed by the societies' reincorporation.

The principal inquiry found in the fourth and last paragraph of the request for this opinion seems to indicate that all business written by the two companies prior to reincorporation was written on an assessment basis. If such contracts are continued on an assessment basis after reincorporation they of course will not add to premium income on which the companies will have to pay the tax provided for in Section 148.340 RSMo 1949.

CONCLUSION

It is the opinion of this office that the premium tax provided for in Section 148.340 RSMo 1949 is to be levied against foreign fraternal benefit societies which have reincorporated as legal reserve, level premium life insurance companies, only to the extent that the contracts remaining in force, or issued by such reincorporated companies, are devoid of assessment liability.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

John M. Dalton
Attorney General

JLO'M/vtl

INSURANCE: Articles of Incorporation of Protective
Casualty Insurance Company.



June 24, 1954

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of June 22, 1954, an examination has been made of an executed copy of Declaration of Intention by original incorporators, together with proof of publication of the same, to form an insurance company to be known as Protective Casualty Insurance Company.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160, RSMo 1949, and not inconsistent with the Constitution and laws of this State and the United States.

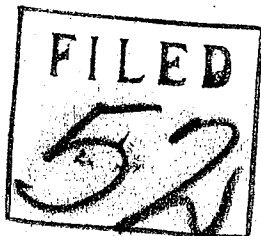
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M/vtl

BOOKKEEPING SERVICE: The preparation of a financial statement does
PUBLIC ACCOUNTANCY: not constitute the practice of public accountancy
ACCOUNTANCY: within the meaning of Section 326.010, RSMo 1949,
so long as the statement is not represented as
having been prepared by a public accountant.



June 25, 1954

Honorable Daniel J. Leary, Attorney
State Board of Accountancy
Post Office Box 613
Jefferson City, Missouri

Dear Sir:

You, at the direction of the State Board of Accountancy,
asked for an official opinion. Your request read in part as
follows:

"* * whether or not in situation A and situa-
tion B described hereinafter, the persons invol-
ved shall be deemed to be in practice as Public
Accountants within the meaning and intent of
Section 326.010, R. S. of Mo. 1949, and particu-
larly sub-paragraph (4) thereof.

"Situation A - A group of persons and firms,
who are not licensed or certified by the Missouri
State Board of Accountancy either as Certified
Public Accountants or as Public Accountants,
have established offices which they term 'Book-
keeping Services'. These firms issue bound
financial statements with their name appearing
thereon, which statements are thereafter exhibited
and circulated among third persons including
financial institutions.

"Situation B - The same circumstances exist as
described in situation A above except that these
'Bookkeeping Services' prepare unsigned finan-
cial statements without use of their names on
the letter head. The unsigned statements are
thereafter circulated among third persons.* *"

Hon. Daniel J. Leary

Those acts determined by the legislature to constitute the practice of public accountancy are set forth in Section 326.010, RSMo 1949 as follows:

"A person shall be deemed to be in practice as a public accountant, within the meaning and intent of this chapter:

"(1) Who holds himself out to the public, in any manner, as one who is skilled in the knowledge, science and practice of accounting, and as qualified and ready to render professional service therein as a public accountant for compensation; or

"(2) Who maintains an office for the transaction of business as a public accountant; or

"(3) Who offers to prospective clients to perform for compensation, or who does perform in behalf of clients for compensation, professional services that involve or require an audit or certificates of financial transactions and accounting records; or

"(4) Who prepares or certifies for clients reports of audits, balance sheets, and other financial, accounting and related schedules, exhibits, statements or reports, which are to be used for publication or for credit purposes, or are to be filed with a court of law, or with any other governmental agency, or are to be exhibited to or circulated among third persons for any purpose;

"Provided, that nothing contained in this chapter shall apply to any person who may be employed by one or more persons, firms or corporations for the purpose of keeping books, making trial balances or statements or preparing reports; provided such reports are not used or issued by the employer or employers as having been prepared by a public accountant."

Hon. Daniel J. Leary

In answering your question, it is necessary for us to consider the entire statute in determining the intent of the legislature in enacting it. *Bowers v. Kansas City Public Service Company*, 41 S.W.2d 810.

It is noted that the legislature in the four numbered paragraphs of Section 326.010 sets forth certain acts which shall be deemed as constituting the practice of accountancy. However, the last paragraph of said section makes a proviso. The Supreme Court of Missouri in *Castilo v. State Highway Commission*, 279 S.W. 673, quoted these statements concerning the effect of a proviso, 1.c. 677:

"* *In 36 Cyc. 1161, it is said:

"'A proviso is a clause engrafted on a preceding enactment for the purpose of restraining or modifying the enacting clause, or of excepting something from its operation which otherwise would have been within it, or of excluding some possible ground of misinterpretation of it, as by extending it to cases not intended by the Legislature to be brought within its purview. The appropriate office of the proviso is to restrain or modify the enacting clause, and not to change it, but where from the language employed it is apparent that the Legislature intended a more comprehensive meaning, it must be construed to enlarge the scope of the act, or to assume the function of an independent enactment.'

"The American and English Ency. of Law (1st Ed.) vol. 23, p. 435, thus tersely defines the office of provisos:

"'A proviso is something engrafted upon an enactment, and is used for the purpose of taking special cases out of the general act and providing specially for them.'"

Thus, it is noted that the preparation of a financial statement for distribution among third persons is declared by numbered paragraph 4 of Section 326.010, RSMo 1949, to be the

Hon. Daniel J. Leary

practice of public accountancy. However, the last paragraph of said Section makes an exception from the operation of numbered paragraph four, and allows such statements to be prepared, so long as they do not purport to have been prepared by a public accountant. The apparent purpose of the legislature was to allow a business to have its books kept, and a report of the financial status of the business made, by persons other than a public accountant, so long as third persons were not misled into thinking that such work was performed by persons having the training, experience, and skills required of public accountants.

For your information, I am enclosing an opinion of this office rendered to Honorable Jay White, Prosecuting Attorney of Phelps County, on November 20, 1953, concerning whether a bookkeeping service constitutes the practice of public accountancy.

CONCLUSION

It is, therefore, the opinion of this office that the preparation of a financial statement does not constitute the practice of public accountancy within the meaning of Section 326.010, RSMo 1949, so long as the statement is not represented as having been prepared by a public accountant.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

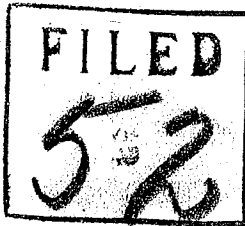
Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:lvd

Enclosure 11-20-53 to Jay White

INSURANCE: Amendment of Articles of Incorporation of
American Automobile Insurance Company.



July 9, 1954

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of July 7, 1954 transmitting a certified copy of the proceedings of the directors and stockholders of American Automobile Insurance Company had on June 15, 1954 and July 6, 1954, respectively, whereby such insurance company amended its Articles of Incorporation so as to increase its capital stock from Two Million Five Hundred Thousand Dollars (\$2,500,000.00) divided into six hundred twenty-five thousand (625,000) shares of the par value of Four Dollars (\$4.00), to Three Million Dollars (\$3,000,000.00) divided into seven hundred fifty thousand (750,000) shares of the par value of Four Dollars (\$4.00) each.

An examination of the certified proceedings referred to in the preceding paragraph discloses that the same are in accordance with the provisions of Sections 379.010 to 379.200, RSMo 1949, and not inconsistent with the Constitution and laws of the state of Missouri and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

By

Julian L. O'Malley
Acting Attorney General

JLO'M:vlw

INSURANCE: Amendment to Articles of Incorporation of Missouri National Life Insurance Company.



July 9, 1954

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

This office has reviewed the certified copy of proceedings of directors and stockholders of Missouri National Life Insurance Company, together with a Certificate of Amendment testifying to such action, such documents being forwarded with your request for a formal opinion under date of June 25, 1954.

Upon examination of the documents referred to in the preceding paragraph, it is found that the Missouri National Life Insurance Company, at meetings of its directors and stockholders held on June 3, 1954, amended its articles of incorporation by increasing the number of authorized shares of capital stock of the par value of \$1.00 each from 25,000 shares to 50,000 shares of capital stock of the par value of \$1.00 each, increasing the authorized capitalization from \$25,000.00 to \$50,000.00, and that said company further amended its articles of incorporation by changing the number of directors of the corporation from nine directors to seven directors.

While some irregularities have been noted in the foregoing proceedings, it is the opinion of this office that the unanimous action taken by all stockholders supporting the amendments causes such amendments to be within the powers granted to said company by Sections 377.200 to 377.460 RSMo 1949, and that they are not inconsistent with the Constitution and laws of this State.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

By: _____

Julian L. O'Malley
Acting Attorney General

INSURANCE: Articles of Incorporation of The Protective
Life Insurance Company.



July 15, 1954

Honorable G. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

I am in receipt of your letter of July 13th in which you enclosed an executed copy of original articles of agreement of incorporators of the proposed The Protective Life Insurance Company to be formed as a stipulated premium company under the provisions of Section 377.200 to 377.460 RSMo 1949.

A review has been made of the articles of agreement referred to in the preceding paragraph and it is the opinion of this office that they are found to fully comply with the provisions of Sections 377.200 to 377.460, RSMo 1949 and that the same are hereby approved under the directive of Section 377.220, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

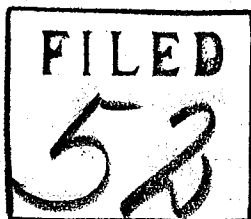
Yours very truly,

JOHN M. DALTON
Attorney General

JLO'M:vlw

INSURANCE: Articles of Incorporation of Hospital and
Medical Insurance Company.

July 16, 1954



Honorable C. Lawrence Leggett, Superintendent
Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of July 15th with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Hospital and Medical Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070 RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1949, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this state and the United States.

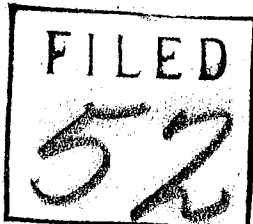
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Very truly yours,

JOHN W. DALTON
Attorney General

JLO'M:vlw

INSURANCE: TV Picture Tube Guaranty No. 5001, not a contract of indemnity insurance so long as sold by seller or one servicing tubes guaranteed, but if TV Picture Tube Guaranty Co. does not service or sell tubes guaranteed, such company must be licensed as an insurance carrier.



July 21, 1954

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

The following opinion is rendered in reply to your request reading as follows:

"You will find attached hereto a so-called 'Guaranty Form' which is now being sold in Kansas City, Missouri. You will also find enclosed a copy of a letter which we have received from the Better Business Bureau of Kansas City, Missouri, which may be of assistance to you in rendering your opinion.

"The purpose of this letter is to respectfully ask you to examine the enclosed documents and render an opinion as to whether or not the enclosed 'Guaranty Form' constitutes a contract of insurance under the applicable statutes of this State."

A rule to guide us at the very commencement of this opinion is aptly stated at 29 Am. Jur., Insurance, Sec. 4, as follows:

"Whether a corporation or association is engaged in the insurance business must be determined by the particular objects which it has in view, and not by abstract declarations of general purposes; the business which the organization is actually carrying on, rather than the mere form of the organization, is the test for determining whether it is carrying on an insurance business."

Honorable C. Lawrence Leggett

In order that no doubt will exist as to the written provisions of the agreement being construed, TV Picture Tube "Guaranty" No. 5001, is here quoted in its entirety:

ORIGINAL

TV PICTURE TUBE

No. 5001

Return to Office

G U A R A N T Y

For the sole consideration of the sum of \$15.00, the receipt of which is hereby acknowledged, the TV PICTURE TUBE GUARANTY COMPANY, 314 Finance Building, Kansas City, Missouri, does hereby guarantee that the picture tube in the television set described below will not wear out or burn out or cease functioning as the result of defects inherent in the picture tube itself during one (1) year from the date hereof. If said picture tube shall cease functioning from such causes, within such period of time, the TV PICTURE TUBE GUARANTY COMPANY agrees to replace (or cause to be replaced) said tube with one new, unused picture tube of the same size and quality as contained in said set at the time of signing of this guaranty, as well as all the costs of installation of the new tube.

EXCLUSIONS

This guaranty does not cover or include color picture tubes, picture tubes which exceed 21 inches in size, nor does it cover, include or guarantee against damage to, breakage or destruction of the picture tube resulting from mishandling, tampering, or negligent acts of the owner or others, including but not limited to, dropping, striking, jarring, bumping or otherwise abusing the set, it being the intent to guarantee only against wearing or burning out under ordinary, reasonable use. Only one (1) picture tube per set will be replaced during the term of this guaranty.

CONDITIONS

This guaranty shall be void if the set described below is sold, rented, loaned, or otherwise transferred to anyone other than the owner, or if the said set or picture tube is removed from the location set forth above without the written permission of the guarantor, and this guaranty is not assignable or transferable. By signing this guaranty below, the owner agrees to give any burned out, replaced picture tube to the TV PICTURE TUBE GUARANTY COMPANY. In the event the picture tube in the television set described below ceases to function, the owner shall have the burden of proving that the failure of said tube comes within this guarantee.

Honorable C. Lawrence Leggett

Owner's Name (Print)

Owner's Address

Receiver Manufacturer

Model

Receiver Number

Size of Tube Tube Number Where Purchased - Date Purchased New
or Used

I HEREBY CERTIFY THAT THIS DESCRIPTION
IS CORRECT, THAT THE ABOVE SET AND TUBE
ARE LESS THAN FOUR YEARS OLD, AND THAT
MY TELEVISION RECEIVER IS NOW PERFORMING
SATISFACTORILY.

Owner's Signature

Date

GUARANTY EFFECTIVE FOR ONE (1) YEAR
FROM 12 O'CLOCK MIDNIGHT ABOVE DATE.

TV PICTURE TUBE GUARANTY COMPANY

By

Representative's Signature

VOID if not countersigned
by M. L. BRINK

President, TV Picture Tube Guaranty Company

IMPORTANT

Should the television set cease functioning, the owner should call a reputable television repair man. If the owner is advised that the picture tube is faulty, notice by written letter or telephone should be given to the TV PICTURE TUBE GUARANTY COMPANY within forty-eight (48) hours after receipt of such advice. Failure to give such notice, or replacement of said tube without notifying the TV PICTURE TUBE GUARANTY COMPANY and permitting it to replace (or cause to be replaced) said tube, voids this guaranty, at the option of guarantor.

TV PICTURE TUBE GUARANTY CO.

314 Finance Building Phone BALTIMORE 6619 Kansas City 5, Mo.

Honorable C. Lawrence Leggett

Section 375.310 RSMo 1949, contains the following language:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * *."

In State ex rel. Inter-Insurance Auxiliary v. Revelle, 165 S.W. 1084, 257 Mo. 529, l.c. 535, the Supreme Court of Missouri spoke as follows:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, l.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him.'"

In reviewing the provisions of the "guaranty" agreement being construed we find the legal consideration of fifteen dollars mentioned therein as moving from the promisee to the promisor, to support the agreement for a specified term of one year. The indemnity promised is capable of admeasurement by arriving at the replacement cost of a new, unused picture tube corresponding in size and quality with the tube which is guaranteed at the time the consideration for the agreement is paid. The actual language of the guarantee is as follows:

" * * * does hereby guarantee that the picture tube in the television set described

Honorable C. Lawrence Leggett

below will not wear out or burn out or
cease functioning as the result of defects
inherent in the picture tube itself during
one (1) year from the date hereof. * * *"
(Underscoring supplied.)

In the case of State of Ohio ex rel Duffy v. Western Auto Supply Company, 134 Ohio St. 163, 16 N. E. 2d 256, 119 A.L.R. 1236, 1.c. 1240, the Supreme Court of Ohio was alluding to the difference between a seller's warranty and an insurance indemnity, and spoke as follows:

"A warranty promises indemnity against defects in the article sold, while insurance indemnifies against loss or damage resulting from perils outside of and unrelated to defects in the article itself."

The rule quoted above from State of Ohio ex rel. Duffy v. Western Auto Supply Company is, in our opinion, to be applied to the agreement offered by TV Picture Tube Guaranty Co., only in the event that such company is a seller of the tubes guaranteed, or when the guarantee is issued after said company has repaired or inspected such tubes. To rule otherwise would allow the company to offer the public a highly speculative indemnity contract not bearing the characteristics of a seller's warranty of product or service, and would be well within the terms of a contract of insurance not to be written except by persons or corporations duly licensed to engage in such business by the State of Missouri.

CONCLUSION

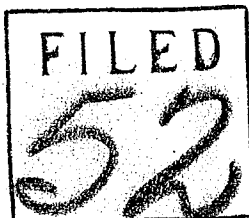
It is the opinion of this office that TV Picture Tube Guaranty, No. 5001, issued by TV Picture Tube Guaranty Co., 314 Finance Building, Kansas City 5, Missouri, is to be construed as a contract of indemnity insurance, unless the object of the guarantee made thereby is sold, or serviced, by TV Picture Tube Guaranty Company. If such conditions are not complied with the agreement is one of insurance which may not be sold or offered for sale unless the promisor is licensed to conduct an insurance business in Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

INSURANCE: Current agreement forms, Nos. 9, 12 and 111 issued by United Development Co., Inc., a Missouri corporation, and Mount Lebanon Cemetery, effect a contract of insurance and may not be negotiated unless said corporation and association are licensed to conduct an insurance business in Missouri.



August 9, 1954

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri —

Dear Mr. Leggett:

The following opinion is rendered in reply to your inquiry reading as follows:

"Re: Mount Lebanon Cemetery

"Dear General Dalton:

"You will find enclosed photostatic copy of a contract being issued by the captioned organization.

"I respectfully ask you to examine these documents and render an official opinion of your office as to whether or not such documents constitute a contract of insurance under the applicable laws of this State."

Documents referred to in the opinion request will be briefly referred to in this opinion as:

- (1) Form 9, "Guarantee" of Mount Lebanon Cemetery.
- (2) Form 111, "Offer" of purchaser to buy, through installment payments, a burial lot from United Development Co., Inc., such company's acceptance of the "offer"

Honorable C. Lawrence Leggett

and the promissory note given by the purchaser to United Development Co., Inc.

- (3) Form 12, "Protection Agreement" executed by Mount Lebanon Cemetery and signed by the purchaser.
- (4) Letter dated May 5, 1954, directed to the purchaser by United Development Co., Inc., and signed by the company's secretary. W. F. Hecht.

For the purpose of this opinion it will not be necessary to quote the full text of each of the documents briefly described above. Pertinent provisions of the documents will be quoted when related to the inquiry being made.

It appears that United Development Co., Inc., a Missouri corporation, has sufficient title and interest in Mount Lebanon Cemetery to allow it to sell burial plots in such cemetery to those who will offer to buy the same for the price fixed in Form 111, and to be paid for by installment payments mentioned, such agreement to be further evidenced by an installment promissory note fully described in Form 111. This "offer" is executed by the purchaser and is accepted by United Development Co., Inc., over the signature of W. F. Hecht, Secretary of the company. The purchase price of the burial plot, plus a service charge, is to be paid in installments over a period of thirty-two months. One of the mutual covenants in Form 111 provides:

"It is intended that this offer shall upon acceptance by the Company become the agreement between the parties and shall be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto."

Under the terms of the installment note made a part of Form 111, "upon non-payment of any installment at its maturity, at the option of the holder, without notice, all remaining installments shall become immediately due and payable, * * *." Another of the mutual covenants in Form 111 which is of prime importance in this inquiry reads as follows:

"The purchaser hereby acknowledges that he or she has carefully read and fully understands the terms of this offer and that there are no conditions or representations other than those contained herein."

Honorable C. Lawrence Leggett

Form 111 discloses that it, the "Offer," was made by the purchaser on May 4, 1954, with acceptance by United Development Co., Inc., on the same date. The installment note of the purchaser is also dated May 4, 1954.

Attention is now turned to Form 12, the "Protection Agreement", dated April 21, 1954 and signed by Mount Lebanon Cemetery over the signature of W. F. Hecht, Secretary. This Form 12 also carries the signature of the purchaser named in Form 111, and discloses what promises are made by Mount Lebanon Cemetery to the purchaser named in Form 111 heretofore described. Although Form 12 is dated April 21, 1954, it is described as being:

"Supplemental to an Agreement of even date,
by and between MOUNT LEBANON CEMETERY,
therein designated the 'Company,' and
Richard G. Kerlin of St. Louis County,
therein designated the 'Purchaser.'"

It is considered that the reference just made, is to Form 111, although the latter discloses a date of May 4, 1954.

Form 12, the "Protection Agreement," is of prime importance and its full text is quoted as follows:

"PROTECTION AGREEMENT

"This Agreement made this 21 day of April,
1954, Supplemental to an Agreement of even
date, by and between MOUNT LEBANON CEMETERY,
therein designated the 'Company,' and
Richard G. Kerlin of St. Louis County,
therein designated the 'Purchaser,'

"WITNESSETH, that:

"WHEREAS, in accordance with the terms of
said Agreement of even date, Purchaser has
purchased from the Company on installment
payments, a plot in Mount Lebanon Cemetery
located in St. Louis County, Mo., containing
4 adult interment spaces to be used exclusively
for interment of Caucasians, and

"WHEREAS, the parties hereto desire to provide
funds for the payment of the purchase price of
said plot, in the event of the death of the
Purchaser and for other interment services as

Honorable C. Lawrence Leggett

hereinafter set forth.

"NOW THEREFORE, in consideration of the premises and the covenants herein contained, the Company AGREES TO GIVE, AT ITS OWN EXPENSE, a non-cancellable five years Protection Plan on the life of the Purchaser with said Company designated as the primary beneficiary under the policy.

"THE COMPANY WILL PAY ALL COSTS upon said Plan and keep same in full force and effect for a period not to exceed five years from date hereof without cost to the Purchaser, provided said Purchaser promptly makes all of the payments in accordance with the terms of his plot purchase agreement of even date and heretofore mentioned. However, said Protection Plan will, at the option of the Company, be allowed to lapse forthwith and all of the right to the hereinafter mentioned protective benefits shall terminate, in case of default for more than thirty (30) days in any of the installment payments in said plot purchase agreement provided.

"IN THE EVENT OF DEATH OF THE PURCHASER, except by his own hands, while this Agreement is in full force and effect, the Company agrees to do the following things:

"Deed to Lot

"To convey to Purchaser's wife, Muriel, herein designated secondary beneficiary, if living, and, if not living, then to the heirs at law or the legal representatives of the Purchaser, a Deed, if not yet issued, to said plot described in purchase agreement WITHOUT FURTHER PAYMENT.

"\$115.00 Grave Marker Installed

"To promptly install upon the plot where Purchaser has been interred in Mount Lebanon Cemetery, an individual Bronze Grave Marker, then regularly sold at retail for not less than \$115.00.- Said Marker shall be inscribed

Honorable C. Lawrence Leggett

with Purchaser's name, date of birth and date of death.

"\$60.00 Interment Services

"To pay to the Funeral Director designated, or to the cemetery, as the case may be, the sum of \$60.00 for, or to apply upon, Purchaser's interment service. Such service to include opening and closing of the grave, erection and use of the Chapel Tent, use of the greens and equipment.

"Cancellation of Balance Due

"To cancel the balance due without any further payment in the event of death of the Purchaser except by his own hands.

"THIS SUPPLEMENTAL AGREEMENT shall become effective when duly signed by an authorized official of the Company.

"IN WITNESS whereof the parties hereto have executed this Supplemental Agreement the day and year first above written.

MOUNT LEBANON CEMETERY,

BY: W. F. Hecht, Secy.

X Richard G. Kerlin
Purchaser "

"Form 12

It will be noted that Form 12, quoted above, alludes to the fact that the Purchaser named in Form 12 has purchased a burial plot in Mount Lebanon Cemetery from United Development Co., Inc.; that the parties to the "Protection Agreement" (Form 12):

" * * * desire to provide funds for the payment of the purchase price of said plot, in the event of the death of the Purchaser and for other interment services. * * *"

Honorable C. Lawrence Leggett

In order to accomplish the objective as outlined above, Mount Lebanon Cemetery agrees to give, at its own expense, a non-cancellable five years Protection Plan on the life of the Purchaser, with Mount Lebanon Cemetery being designated as the primary beneficiary under the policy. Under the "Protection Agreement", Form 12, quoted above, Mount Lebanon Cemetery agrees that if the Purchaser named in Form 111 promptly makes all of his installment payments becoming due on the burial plot purchase agreement (Form 111), Mount Lebanon Cemetery will pay all costs upon the Protection Plan (Form 12) for a period of five years, such Protection Plan calling for (1) a deed to the burial plot contracted by the purchaser to be bought from United Development Co., Inc., (2) installation of a grave marker, and (3) interment services of the value of \$60.00. A cancellation clause in the Protection Agreement provides that Mount Lebanon Cemetery agrees:

"To cancel the balance due without any further payment in the event of death of the Purchaser except by his own hands."

Form No. 9, a "Guarantee" issued by Mount Lebanon Cemetery provides as follows:

"GUARANTEE

"Mount Lebanon Cemetery does hereby certify that the following statements are true and correct relative to the attached agreement for the purchase of a burial lot:

"1. That the said lot is free and clear of all encumbrances and tax obligations.

"2. That Mount Lebanon Cemetery has been dedicated exclusively for the interment of members of the Caucasian race.

"3. That the purchaser shall have the right to transfer ownership in his or her lot to another member of the Caucasian race.

"4. No space for interment in the Garden where a selection may be made, will be sold for less than One Hundred Sixty-Five (\$165.00) Dollars per space, including care and maintenance fees, after said Garden is fully completed."

Honorable C. Lawrence Leggett

The document which discloses that the entire plan is in operation is manifested by the following letter dated May 5, 1954:

"Perpetual Care

Perpetual Charter

MOUNT LEBANON
The Cemetery Exclusive
Where Equality Endures

Situated on St. Charles Road and Lindbergh Boulevard

United Development Co.
Fiscal Agent

Overland, Mo.
May 5, 1954

Route No. 7, Overland, Mo. 14
Terryhill 5-2900

"Richard G. Kerlin
8349 Archer
St. Louis 14, Mo.

Dear Mr. and Mrs. Kerlin:

We are happy to inform you that your application for a 4 space Family Memorial Shrine, including the five-year protection plan, has been processed and approved.

The protection plan is now in effect, and you may come out to Mount Lebanon any Sunday between the hours of 1:00 and 4:00 p.m. and select your memorial estate in one of our approved gardens of memory.

May we take this opportunity to congratulate you upon your wise decision and action that you have taken for your family's protection and inevitable needs.

You will receive a payment booklet from the St. Johns Community Bank in the near future, first payment beginning on June 15, 1954 of \$10.70 and \$10.70 each month thereafter until the balance has been paid.

Very truly yours,

UNITED DEVELOPMENT CO.

W.* F. Hecht, Secretary."

Honorable C. Lawrence Leggett

The foregoing instruments are abundant proof that United Development Co., Inc., through its Secretary, W. F. Hecht, and Mount Lebanon Cemetery, through its Secretary, W. F. Hecht, have become parties to agreements with the "Purchaser" named in said agreements in such manner as to cause the two agreements to be inseparable and to cause one agreement to be dependent upon and consideration for the other. This being so, we view the affect of the agreements as follows:

United Development Co., Inc., and Mount Lebanon Cemetery have contracted with a Purchaser for the sale of a burial plot in Mount Lebanon Cemetery at a fixed price to be paid for in installment payments over a period of thirty-two months, and as an inducement to the Purchaser and as part of the consideration moving to the Purchaser, United Development Co., Inc., and Mount Lebanon Cemetery have effected upon the life of the Purchaser a five year Protection Plan which guarantees to the Purchaser a deed to the burial plot, a grave marker of the value of \$115.00 and interment services of the value of \$60.00. If the Purchaser should die, except by his own hand, prior to the completion of payment of the thirty-two monthly installments payable on the purchase price of the burial plot, and without default causing cancellation of said agreement, the burial plot, grave marker and interment services are furnished, and any balance due on the purchase price of the burial plot is cancelled.

Missouri statutes do not define a "contract of insurance." The essential elements of a contract of insurance are alluded to in the following language from State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 165 S.W. 1084, 257 Mo. 529, l.c. 535:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss.* * *"

Honorable C. Lawrence Leggett

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, l.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"* * * Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539). Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him.'"

The insurance character of burial associations is evident from the following language found in Section 376.020, RSMo 1949, of Missouri's regular life insurance company law:

"* * * provided, that any association consisting of not more than one thousand five hundred citizens, resident of the state of Missouri, all living within the boundaries of not more than three counties in this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each member, to be given to a beneficiary or beneficiaries named by the deceased member in his or her certificate of membership, said certificate of membership to be issued by such association, shall not be construed to be life insurance company under the laws of this state, * * *."

In 44 C.J.S., Insurance, Sec. 48, p. 494, we find burial insurance referred to in the following language:

"Burial insurance is a contract based on a legal consideration whereby the obligor undertakes to furnish the obligee, or one of the latter's near relatives, at death, a burial reasonably worth a fixed sum."

Honorable C. Lawrence Leggett

The foregoing citation disclosing a definition of burial insurance bears remarkable likeness to the following definition found in 1 Joyce on Insurance (2 Ed) p. 87:

"Burial insurance is a contract based upon a legal consideration, whereby the obligor undertakes to furnish the obligee, or one of the latter's near relatives, at death, a burial reasonably worth a fixed sum. It is a valid contract, and constitutes life insurance."

In 1 Couch on Insurance, Section 32, burial insurance is referred to in the following language:

"Burial or funeral benefit insurance is valid, and being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance."

It will not be questioned that "risk" is one of the essential elements of an insurance contract. The "risk" to be assumed under the agreements here considered is well illustrated by the provision found in Form 12, which makes a covenant "to cancel the balance due without any further payment in the event of death of the Purchaser except by his own hands." In other words, if the Purchaser should die, except by his own hand, after making one or two installment payments on his agreement to purchase the burial plot, the return to him in the form of interment services, grave marker and deed to the burial plot would bear no true or correct relationship to the actual amount he had paid on his contract. The result under such circumstances discloses a pure insurance risk.

Section 375.310 RSMo 1949 provides, in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * *."

Honorable C. Lawrence Leggett

CONCLUSION

It is the opinion of this office that United Development Co., Inc., a Missouri corporation, and Mount Lebanon Cemetery, by negotiating Forms 9, 12 and 111, described in the foregoing opinion have effected a contract of insurance and are subject to the penalties prescribed by Section 375.310 RSMo 1949, unless licensed to conduct such insurance business by the Superintendent of the Division of Insurance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO'M:vlw

INSURANCE: Contract of Floral Hills Memorial Chapels, Inc., with Oliver F. Gregg, dated June 10, 1953, not an insurance contract. Persons negotiating such contracts not required to be licensed by superintendent of division of Insurance.



September 15, 1954

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

The following opinion is rendered in reply to your request reading as follows:

"Over a period of some three or four years this Division has received complaints from various organizations and individuals concerning contracts issued by the captioned company, which provide certain funeral benefits in case of death of the party contracting with the company.

"You will find attached hereto a photostatic copy of the contract which is currently being issued by the company and I respectfully ask an opinion from your office as to whether or not the said contract constitutes an insurance contract under the applicable laws of this State."

Your request calls upon this office to review the written provisions of a certain contract purportedly entered into between Floral Hills Memorial Chapels, Inc., of Kansas City, Missouri, as one contracting party, and Oliver F. Gregg, 4434 Park, Kansas City, Missouri, as the other contracting party, such contract bearing date of June 10, 1953. The purpose of this review is to determine if the contract is one which contains covenants and agreements which will cause the same to be denominated a "contract of insurance," the offering for sale of which would be in violation of Section 375.310, RSMo 1949, which statute provides, in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been

suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * * ."

At the very outset it must be stated that Floral Hills Memorial Chapels, Inc., is not licensed by the Missouri Division of Insurance to conduct an insurance business in this State.

It will not be necessary to copy into this opinion the full text of the contract, heretofore referred to by date, but the prominent features of the contract will be reviewed by summarizing specific provisions which will cause the contract to give evidence on its face that it is or is not a "contract of insurance."

Summarized, the contract provides:

- (1) Floral Hills Memorial Chapels, Inc., covenants and binds itself to furnish Oliver F. Gregg, or his assignee, specific merchandise and services which are to be useful only after the death of Oliver F. Gregg, or his assignee. Such merchandise and services meet the needs of one who desires a respectable burial.
- (2) To cover the cost of merchandise and services to be supplied, Oliver F. Gregg agrees to pay Floral Hills Memorial Chapels, Inc., by depositing with Floral Hills Provisional Covenants Trust Association, as Trustee, the sum of \$500.00, with an additional guarantee charge of \$25.00, the entire amount payable in fixed monthly installments until the full \$525.00 is paid. The final \$300.00 paid of the entire amount of \$525.00, is to be deposited with Floral Hills Provisional Covenants Trust Association, as Trustee, to be held until all obligations under the contract are performed.
- (3) If Oliver F. Gregg defaults in any of his regular payments and such default continues for a period of more than thirty days, then Floral Hills Memorial Chapels, Inc., may declare all payments, theretofore made, forfeited as and for liquidated damages and terminate the contract.
- (4) All of the benefits and provisions of the contract may inure to any member of the immediate family of Oliver F. Gregg should such contingency arise, upon payment of the unpaid installments due under the contract.
- (5) It is recited in the contract that the purchase price set out in the contract is based upon standard published manufacturer's material and labor costs as of the date of the agreement. However, at the time of delivery of merchandise and the performance of the obligations, if such costs are lower than those at the date of the agreement, Floral Hills Memorial Chapels, Inc. will refund the difference in costs, provided, however, should the costs of said

merchandise and/or services be more at the date of delivery, Oliver F. Gregg agrees to pay, as part of the purchase price, an additional sum equaling the exact increase in costs to Floral Hills Memorial Chapels, Inc.

(6) When Oliver F. Gregg has paid ten per cent of the purchase price named in the contract he becomes one of a group of persons holding like contracts whose lives are insured under a group policy of life insurance issued by the American National Insurance Company of Galveston, Texas. Payment of this insurance is contingent on the death of the insured, with the face amount of the policy to be measured by the unpaid balance of indebtedness owed to Floral Hills Memorial Chapels, Inc. by Oliver F. Gregg at the time of his death and prior to his making full payments under his contract. If it should become necessary for the insurance company to pay under its group policy, due to the death of Oliver F. Gregg, the insurance company pays the amount due, to Floral Hills Memorial Chapels, Inc., as a creditor of Oliver F. Gregg, debtor.

As above summarized, the provisions of the contract entered into between Floral Hills Memorial Chapels, Inc., and Oliver F. Gregg, evidence a unique plan for attracting new business for Floral Hills Memorial Chapels, Inc. Having stated the prominent provisions of the contract, it now becomes necessary to rule them as being within, or outside of, the scope of a "contract of insurance."

Missouri statutes do not define a "contract of insurance." The essential elements of a contract of insurance are alluded to in the following language from State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 165 S.W. 1084, 257 Mo. 529, l.c. 535:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, l. c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay him a sum of money, or otherwise indemnify him.'"

The insurance character of burial associations is evident from the following language found in Section 376.020 RSMo 1949, of Missouri's regular life insurance company law:

"* * * provided, that any association consisting of not more than one thousand five hundred citizens, resident of the state of Missouri, all living within the boundaries of not more than three counties in this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each member, to be given to a beneficiary or beneficiaries named by the deceased member in his or her certificate of membership, said certificate of membership to be issued by such association, shall not be construed to be life insurance company under the laws of this state, * * *."

In 44 C.J.S., Insurance, Sec. 48, p. 494, we find burial insurance referred to in the following language:

"Burial insurance is a contract based on a legal consideration whereby the obligor undertakes to furnish the obligee, or one of the latter's near relatives, at death, a burial reasonably worth a fixed sum."

The foregoing citation disclosing a definition of burial insurance bears remarkable likeness to the following definition found in 1 Joyce on Insurance (2 Ed), p. 67:

"Burial insurance is a contract based upon a legal consideration, whereby the obligor undertakes to furnish the obligee, or one of the latter's near relatives, at death, a burial reasonably worth a fixed sum. It is a valid contract, and constitutes life insurance."

In 1 Couch on Insurance, Section 32, burial insurance is referred to in the following language:

"Burial or funeral benefit insurance is valid, and being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance."

"Appellants are, each and all, residents of Quitman County, and they conduct as partners at Marks, in that county, a business called Marks Burial Association. On June 15, 1938, the Association issued to V. T. Smith a funeral benefit contract by which, in consideration of a registration fee of \$1 and a small monthly premium to be paid thereafter until death, the Association agreed 'to furnish a Complete Funeral, consisting of Casket, Robe and Hearse valued as follows:

In holding that the above described contract was a contract of burial insurance the Supreme Court of Mississippi rested its decision on the definition of burial insurance as taken from 1 Joyce on Insurance (2Ed.), p. 87, quoted supra. Before passing from this case we desire to make special note of the type of consideration moving from the contract holder to Marks Burial Association--a registration fee of \$1 and a small monthly premium to be paid thereafter until death. We will refer to this legal consideration after commenting on adjudicated cases in which the courts have held certain contracts to be burial insurance contracts. (Emphasis supplied)

In Renschler v. State, 107 N.E. 758, 90 Ohio St. 363, the contract was termed a mutual note whereby the party of the first part promised to pay the undertaker during the life of first party the sum of fifteen cents (termed 'interest') on or before the 10th day of

each month in advance. The face value of the note varied from \$50 to \$100. The contract or note provided that if the said first party be not in default at the time of his or her death, the second party, undertaker, agreed to furnish funeral for said first party. (Emphasis supplied)

In *Sisson v. Prata Undertaking Co.*, 49 R.I. 132, the contract which was held to be an insurance contract is best described by quoting from the case at 49 R.I. 132, l.c. 133, as follows:

"By its contracts respondent agrees to perform specified services and provide some of the furnishings and materials necessary for the funeral and burial of the person named in the contract subject to certain conditions. The contracts are in two forms but all are subject to the condition that the contract holder shall pay a certain sum, monthly or annually, in order to become entitled to the benefits under the contract, and in case default is made in such payments the contract becomes void and the holder loses all rights and benefits thereunder. One form of contract provides that a casket is to be furnished with some other necessities for a funeral at the expense of the respondent. The other form of contract does not include a casket but states that the services and materials to be furnished for the funeral by the respondent are of the value of \$70. This form of contract requires the annual payment of \$1.00 by the contract holder 50 years old and \$2.00 by the contract holder 65 years old. The annual payments are to be made until the amount of \$50 has been paid. Each contract provides that in the event of the death of the holder before the payment of said amount the holder shall be entitled to the funeral without further payment by his heirs." (Emphasis supplied)

A case bearing close analogy, insofar as contract provisions are concerned, to the facts disclosed in the contract of Floral Hills Memorial Chapels, Inc., is *Harrison v. Tanner-Poindexter Company*, 1 S.E. 2d 646, 187 Ga. 678. In this case the court was construing a contract providing for certain funeral benefits. The definition of life insurance before the court was as follows:

"That a contract of life insurance is one whereby the insurer, for a consideration, assumes an obligation to be performed

upon the death of the insured, or upon the death of another in the continuance of whose life the insured has an interest, whether such obligation be one to pay a sum of money, or to perform service, or to furnish goods, wares or merchandise or other thing of value, and whether the cost or value of the undertaking on the part of the insurer be more or less than the consideration flowing to him."

The contract being construed in *Harrison v. Tanner-Poindexter Company*, cited above, provided, in part, as follows:

"It is mutually understood and agreed between the parties that the price to be paid for said articles above named is the sum of \$250, to be paid in instalments as hereinafter provided; the sum of \$4 having been paid on this date, and the sum of \$.75 to be paid on each 2 months thereafter, on the first of each such month, until the purchase price is paid, with interest only after maturity, such payments to be applied on the articles so purchased. . . . In the event of failure to pay any instalment or any number of such, all said instalments provided for in this contract may be declared due and payable by said first party, unless waived in writing by first party, then the amount then existing under this contract shall become due and payable. It is further agreed by the parties that delivery of the articles of merchandise so purchased as aforesaid is hereby waived, the same to be delivered upon the payment of \$100 of purchase-price. In the event of death of second party before full compliance with this contract, the liability for the remaining instalments shall be paid from the estate of the second party in amounts stated in this contract on the same instalment plan and in the amounts stated.

* * *

Tanner-Poindexter Company contended that the contract referred to above was not an insurance contract for the reason, among others, that there was no element of risk in so far as each contract of sale was concerned, since the terms of sale were definitely fixed and the amounts to be paid for the merchandise were definitely stated, and for the further reason that the death of the purchaser did not terminate the contract or the payments due thereunder. In holding the contract to be a life insurance contract within the definition of a "contract of life insurance" as defined by the statutes of Georgia,

the court spoke as follows at 189 Ga. 678, l. c. 685, 686:

"Under the foregoing method the company, in the language of the act of 1937, supra, 'for a consideration, assumes an obligation to be performed upon the death of the' purchaser 'or upon the death of another in the continuance of whose life. . (he) has an interest,' namely to furnish the goods and render the stipulated funeral service. The result is that the business is to be characterized as a life-insurance business within the meaning of the act of 1937, and the company--whether it be an individual 'person, firm or corporation . . shall be deemed to be engaged in the business of life insurance,' within the meaning of section 1 of the act, and 'subject to all of the provisions of the laws of Georgia regulating life-insurance companies.' It is true the contract provides that the specified articles of merchandise may be delivered at any time upon the payment of \$100. But burial of the dead is the main object of the purchase, and is essential to complete performance of the company's obligation. The goods are desired only in connection with the funeral service which in natural course of events must follow death, as no intent to bury the living could be attributed to the parties. In the circumstances the company was engaged in the life-insurance business as defined in the act of 1937, supra, and was subject to the regulatory provisions of the law relating to life insurance generally."

The Tanner-Poindexter Company case, cited supra, was decided on February 16, 1939, solely on the new Georgia statute defining a "contract of insurance," as passed and approved March 31, 1937. It is of interest to note that on October 16, 1936, the Supreme Court of Georgia, in the case of South Georgia Funeral Home Incorporated et al. v. Harrison, 188 S.E. 529, 183 Ga. 379, held that the Georgia state court erred in adjudging defendants in contempt of court for alleged violation of an injunctive order which enjoined defendants from selling their so-called option contracts for funeral services and merchandise. It was as a result of this opinion that Georgia enacted its new statute in 1937 re-defining a "life insurance contract," with the ultimate result of the ruling in the Tanner-Poindexter Company case, cited supra. We consider the following language found in the decision of South Georgia Funeral Homes et al. v. Harrison, 183 Ga. 379, l.c. 382, to be of great weight in arriving at the final conclusion

to be stated in this opinion:

"We think it can safely be said, however, that a contract of life insurance must contain an element of risk in so far as the particular individual contract is concerned. The contract now being sold by the defendants, and by reason of the sale of which this contempt proceeding arose, is one wherein the defendant corporation, for a fixed and definite sum in hand paid or payable in installments, agrees to render and perform or cause to be rendered and performed, for the purchaser or any one member of his family, certain funeral services, with the additional obligation to allow the purchaser to buy funeral merchandise in connection with the funeral, for a price definite and ascertainable. While the performance of the contract is contingent upon death, this in and of itself does not make it a contract of life insurance, nor does the fact that the fixed sum is payable in installments. There is nothing in the contract itself, nor is there any evidence, to show that the amount paid by the purchaser is less than the value of the funeral services contracted to be performed, or that there is any element of risk involved, either on the part of the purchaser or the defendant corporation. The contract on its face does not appear to be one of life insurance."

In Richards On Insurance (5th Ed.), Vol. 2, Sec. 206, we find the following discourse on "risk":

"'Risk' in insurance law is an uncertainty surrounding the possible occurrence of the Insured Event. It is not 'chance of loss' in the sense that the frequency with which any given number of exposures are subjected to an unfavorable contingency will result in financial loss. 'Risk' should also be differentiated from 'hazard' which is but a situation or action which can cause loss; and from 'loss' which pertains to an unintentional parting with value. 'Risk' might best be defined as (1) fortuitous, i. e., the event or events described may happen but not must happen; wear and tear, inherent

defect or vice, depreciation of property, etc. etc. are not appropriate subjects of ordinarily insurable risks, (2) extraneous, i. e., the event or events arise from external causes, not from internal causes such as decomposition or disintegration, (3) lawful, i. e., the event or events do not describe possession or ownership of illegal property like narcotics, lottery tickets, etc. etc. which are noninsurable risks, and (4) not contributed to by the insured's wilful or fraudulent act, i. e., the event or events are not precipitated or within the control of the parties so that in accord with public policy there is no profit in the given wrong."

To cite additional cases from other jurisdictions where contracts providing for the furnishing of merchandise or services at time of death have been held to be insurance contracts would not be of further help in ruling the contract under consideration. Stated simply, it is the opinion of this office that the contract being construed does not contain the essential elements necessary to attribute to it the character of an insurance contract as judicially defined by the appellate courts of Missouri; that for this office to adopt the statutory definition of an insurance contract as enacted by foreign states in order to rule the contract before us to be a contract of insurance would be usurping a legislative function; and that the contract in question is not so drawn as to embrace the element of "risk" so essential to all valid insurance contracts. If offering of this type of contract to the public discloses hazards which should be obviated, such matters should be addressed to the attention of the State legislature.

CONCLUSION

It is the opinion of this office that the contract purportedly entered into between Floral Hills Memorial Chapels, Inc., of Kansas City, Missouri, and Oliver F. Gregg, 4434 Park, Kansas City, Missouri, bearing date of June 10, 1953 is not a contract of insurance, within the meaning of language contained in Section 375.310 RSMo 1949, and persons negotiating such contracts are not required to be licensed by the superintendent of the division of insurance.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

Yours very truly,

JLO'M/vtl:da

JOHN M. DALTON
Attorney General

PUBLIC ROADS: A public road which has not been used by the public for a period of five years continuously becomes abandoned and ceases to have a legal existence.



June 23, 1954

Honorable J. S. Lincoln
Representative
Harrison County
Gainsville, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Several months ago a farmer, Mr. Olaf Anderson, of near Ridgeway, Mo., came to me and talked to me about a road which had been closed for years and reopened without consulting him, - this road joining his farm on the North. Today he called on me again and advised me that he had been advised to write you and he asked me if I would write you for him.

"It seems that this road has been closed for 25 or thirty years; in fact I have been told that it had not been used since 1916. When Mr. Anderson bought this farm seven years ago, his North fence ran down the center of what had been this public road, which had been abandoned all these years. While Mr. Anderson and wife were in Iowa, the Township Board, at the insistence of Mr. Dean Johnson, who owns land East of the Anderson land, tore down the fence and made a road to give access to the Johnson land from the West. This abandoned road when a public road, had extended one half mile East, along the North edge of what is now the Anderson land, then one quarter mile South, then one half mile East where it continued on East and, at the end of this last half mile East, also connected with a public road running South. As it now is, only the first

Honorable J. S. Lincoln

half mile, from the West, along the North edge of the Anderson land was opened; it does not connect with any public road and is for the sole purpose of gaining access to the Johnson land. Mr. Anderson was not consulted before the road was opened, does not want to give any land for this private road and wants to know what his recourse is. The Johnsons already have access to their land via public roads, aside from this private road which they have had opened.

"I recall a bill passed this session of the Legislature which provides that where a road has been abandoned five years or longer, it ceases to be a public road."

You state that the road in question "has been closed for 25 or thirty years" prior to its recent opening. Assuming this statement to be correct, it is our opinion that non-use of this road for this period of time constituted an abandonment; that the road ceased to have a legal existence; and therefore could not be "reopened" because no road existed to reopen.

In this regard we direct your attention to Section 228.190, RSMo, Cum. Supp., 1953, which reads as follows:

"All roads in this state that have been established by any order of the county court, and have been used as public highways for a period of ten years or more, shall be deemed legally established public roads; and all roads that have been used as such by the public for ten years continuously, and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads; and non-user by the public for five years continuously of any public road shall be deemed an abandonment and vacation of the same."

Prior to 1953 the time required to effect an abandonment was ten years instead of five, as it now is.

There are many Missouri cases construing the above statute. We select at random one such case containing a clear discussion of this law. In the case of Oetting v. Pollock, 189 Mo. App. 263, at l.c. 270, et seq., the court stated:

Honorable J. S. Lincoln

"There may be a vacation of a public highway by proceedings under the statute, as we have shown, or the vacation may occur by abandonment under section 10446, Revised Statutes 1909 - from nonuser by the public for a period of ten years continuously. That is to say, 'a highway may cease to exist either by abandonment or by vacation according to law.' (2 Elliott on Roads and Streets (3 Ed.), sec. 1172.) The same authority (Sec. 1173) holds that the burden of showing an abandonment is upon the party who asserts it. The court in our case, in its finding of facts, stated that this road has been regarded by most of the people living in the neighborhood of it as an abandoned road. We do not believe this is sufficient to constitute abandonment. If no other way existed of vacating highways, it might be argued with good reason that what most of the people thought who were entitled to use a highway would be a controlling factor. In the case of O'Dea v. State (Neb.), 20 N. W. 299, 300, the rule is thus declared: 'In order to vacate a road by nonuser, there must be a clear and entire abandonment of the road by the public for the statutory period..... Officers and courts cannot inquire into the extent of the use whether used much or little by the public. If used at all, the road will not be deemed vacated.' * * *

In the instant case it appears that there was no use whatever of this road for a period of time much greater than is required by statute to constitute an abandonment, and that therefore the road ceased to have a legal existence and, since it did not exist, could not be reopened.

We note that you inquire of us what recourse may be taken by an owner of land abutting upon this passageway which has been opened, which opening takes and turns into roadway a portion of land claimed by the abutting landowner. We feel that an action which might be instituted in this matter would be a private action which would have to be brought by the landowner through a private attorney, and that it is therefore a matter which is not within the jurisdiction of this department. For this reason we do not discuss this phase of your opinion request.

CONCLUSION

It is the opinion of this department that a public road which has not been used by the public for a period of five years continu-

Honorable J. S. Lincoln

ously becomes abandoned and ceases to have a legal existence.

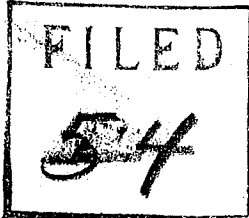
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

BANKS:
LOAN LIMITS:



In a situation where two or more persons are partners in an enterprise, and carry a partnership account in a bank, but borrow no money in the partnership name, the individual borrowing of any of the partners is not to be taken into consideration in determining the loan limit from the bank of any other partner or partners.

October 8, 1954

Senator Edward V. Long
Senator 21st District
Bowling Green, Missouri

Dear Senator Long:

Your recent request for an official opinion reads as follows:

"In considering some possible legislation this coming Session, I would appreciate the following Opinion on a situation which I believe Section 362.170, Paragraph D, Revised Statutes of Missouri, 1949, attempts to cover.

"In this situation, Mr. Smith and Mr. Jones are partners in an enterprise and carry a partnership account in the bank but borrow no money in the partnership name. Mr. Smith has a line of credit in his individual name and Mr. Jones has a line of credit in his individual name, but such individual borrowing in no way applies to the partnership. Is the debt of these two added together when computing the loan limit that can be advanced to one of them?"

Subparagraph (1, d) of Section 362.170 RSMo 1949, reads:

"(d) In computing the total liabilities of any individual to a bank there shall be included all liabilities to the bank of any partnership of which he is a member, and any loans made for his benefit or for the benefit of such partnership; of any partnership to a bank there shall be included all liabilities of its individual members and all loans made for the benefit of such partnership or any member thereof; and of any corporation to a bank there shall be included all loans made for the benefit of the corporation."

We do note that Section 388, page 802, Vol. 9, C.J.S. states in part:

Honorable Edward V. Long

"The statutory limitation on amount of loans is one on the primary liability of a single person or corporation to pay to the bank a certain amount of money, regardless of whether the bank itself furnished him with that money or purchased the indebtedness from another."

The above general statement is not too helpful, however, in the specific situation set forth by you. We must, therefore, look at the bare face of the subsection and attempt to construe its meaning. From the opinion request it is clear that the partnership has no money borrowed from the bank, nor does it seek to borrow money from the bank. The only potential borrowers are Smith and Jones, each of whom has previously established credit with the bank, and each of whom has an account with the bank. Consequently, we are dealing with the right of an individual under the subparagraph to borrow from the bank, and we are ascertaining what liabilities of such individual are to be taken into consideration when determining the loan limit of this individual.

The first portion of the subparagraph of the statute deals with the total liabilities of any individual to a bank and among these liabilities we are forced to include:

- (1) All liabilities to the bank of a partnership of which the individual is a member;
- (2) Any loans made for the benefit of the individual securing an additional loan;
- (3) Any loans made for the benefit of the partnership of which the individual seeking the loan is a member.

From the facts outlined in the second paragraph of the opinion request I conclude that no liabilities named in (1) and (3) outlined above are in evidence when Mr. Smith or Mr. Jones applies for an individual loan.

The second portion of the subparagraph of the statute deals with a loan being made to any partnership. The facts before us do not disclose that a loan is to be made to a partnership, consequently, the second portion of the subparagraph does not come into play.

The third portion of subparagraph of the statute deals with a loan to a corporation and of course the facts in this opinion request do not involve a loan to a corporation.

Honorable Edward V. Long

It is our opinion that since the partnership of which Mr. Smith and Mr. Jones are members, is not seeking to borrow any money, the individual partners may seek to have their own individual line of credit increased without having the liabilities of each added for the purpose of determining the loan limit of either of the individuals composing the partnership.

CONCLUSION

It is the opinion of this department that in a situation where two or more persons are partners in an enterprise and carry a partnership account in a bank, but borrow no money in the partnership name, that the individual borrowing of any one of the partners is not to be taken into consideration in determining the loan limit from the bank of any other partner or partners.

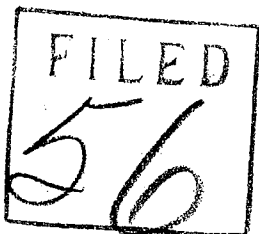
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

TAXATION AND REVENUE: Tangible personal property of Missouri corporations to be assessed in county or counties where situated on the first day of January of each calendar year.



March 11, 1954

Mr. Douglas Mahnkey,
Prosecuting Attorney
Taney County
Forsyth, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"Our Assessor comes to me with this problem;

"There are two large construction companies on road and bridge jobs here and both are Missouri corporations. Some one from the Tax Commission advised the County Court that all the equipment of the companies located here on the job on January 1, 1954 would be assessed here in Taney County, Missouri.

"Question: Would the trucks, dozers, and other heavy machinery be assessed here which was located here on January 1, 1954?"

Your attention is directed to Section 137.095, RSMo 1949, which reads as follows:

"All tangible personal property of business and manufacturing corporations shall be taxable in the county in which such property

Honorable Douglas Mahnkey

may be situated on the first day of January of the year for which such taxes may be assessed, and every business or manufacturing corporation having or owing tangible personal property on the first day of January in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located, shall make return thereof to the assessor of such county or township where situated, in the same manner as other tangible personal property is required by law to be returned."

In connection with the quoted statute it is our thought that Section 137.140 is also pertinent with respect to the duties enjoined upon the several county assessors of the various counties of this state. The latter statute reads as follows:

"The real and tangible personal property of all corporations operating in any county in the state of Missouri and in the city of St. Louis, and subject to assessment by county or township assessors, shall be assessed and taxed where situated."

CONCLUSION

In the premises we are of the opinion that the tangible personal property of domestic business and manufacturing corporations of the State of Missouri is to be assessed in the county or counties wherein such tangible personal property may be physically situated on the first day of January of each calendar year.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

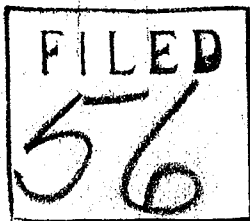
JOHN M. DALTON
Attorney General

WFB:vlw

Right
ELECTIONS:
PRIMARY ELECTIONS:
VOTERS:

A person voting in a primary election morally obligates himself to support the nominee of the primary in which he participates. However, this obligation cannot be enforced by any court of law.

June 17, 1954



Honorable Douglas Mahnkey
Prosecuting Attorney
Taney County
Forsyth, Missouri

Dear Sir:

By letter dated April 29, 1954, you requested an official opinion as follows:

"This question has been propounded to me in view of the coming primary:

"May a voter ask for and receive for purpose of voting any party ticket he desires without obligating himself as to General Election?"

The qualifications required for a person offering to vote in a primary election are prescribed by Section 120.460, RSMo 1949. Said Section reads as follows:

"No person shall be entitled to vote at any primary unless a qualified elector of the precinct and duly registered therein, if registration thereat be required by law, and known to affiliate with the political party named at the head of the ticket he calls for and attempts to vote, or obligates himself to support the nominees of said party at the following general election."

Under certain circumstances, a voter in a primary election is required to take an oath. This requirement is made by Section 120.470, RSMo 1949, which reads as follows:

"It shall be the duty of the challenger to challenge and the duty of the judges

Honorable Douglas Mahnkey

of election to reject the ballot of any person attempting to vote other than the ticket of the party with which he is known to be affiliated, unless such person, when challenged, obligates himself, by oath or affirmation administered by one of the judges, to support the party nominees of the ticket he is voting in the following general election. All judges of the election shall have authority and are empowered to administer such oath or affirmation, and any person offering to vote who shall fail or refuse to take or make such oath or affirmation when demanded by such challenger, or required by any judge, shall not be allowed to vote at such primary election."

We are unable to find a Missouri case pertaining to the enforceability of the two above statutes. However, in the State of Texas there is a requirement that the following "test" be printed on each ballot in a primary election:

"I am a _____ (inserting the name of the political party or organization of which the voter is a member) and pledge myself to support the nominees of this primary."

The Supreme Court of Texas in 111 Tex. 29, Westerman et al. v. Mims, 227 S.W. 178, discussed the effect of the Texas provision at some length. That discussion is quoted herewith (l.c. 180, 181):

"If the entire purpose be not accomplished in determining whether the voter is a member of the party, having a subsisting intent to support the nominees, still we cannot say that the pledge imposes an executory legal obligation. The specific statutory pledge is to 'support' the primary nominees. As stated by Webster, to 'support' is 'to uphold by aid or countenance.' The Legislature must have given such an interpretation to the pledge, if they considered it binding on future conduct, in exacting it of women

Honorable Douglas Mahnkey

voters, when extending suffrage to them in primaries and conventions only.

"The vital distinction between a legal obligation and a moral obligation is that it is practicable to enforce the former and impracticable to enforce the latter. To give effect to the distinction is to deny that the pledge imposes a legal obligation on the voter. It is utterly impracticable to enforce an obligation to uphold another by aid or countenance through either a decree for specific performance or an award of damages.

"Of the decisions relied on by the contesting respondents to sustain the view that the pledge imposes a legal obligation on the voter, the case of State ex rel. Labauve v. Michel, Secretary of State, 121 La. 374, 46 South. 434, seems nearest in point. In disposing of the objection that the statute requiring the voter to declare his affiliation with the party holding the primary violated the article of the Constitution of Louisiana which secured the voter the right to prepare his ballot in secrecy, the court said:

"The answer to this is that the voter, by participating in a primary, impliedly promises and binds himself in honor to support the nominee, and a statute which exacts from him an express promise to that effect adds nothing to his moral obligation and does not undertake to add anything to his legal obligation. The man who cannot be held by a promise which he knows he has impliedly given will not be held by an express promise."

"We do not regard this opinion as contrary to our conclusion. The court affirmed that the primary voter, with or without the statute, incurred a moral obligation binding on his honor. The court concluded that the obligation was no greater with than without the statute. In our opinion, the court did not

Honorable Douglas Mahnkey

declare or mean to declare that there is any legal obligation with or without the statute. On the contrary, the court found that there had been no attempt by the Legislature, in enacting the statute, to impose on the voter anything in the way of a legal obligation.

"In our opinion, a voter cannot take part in a primary or convention of a party to name party nominees without assuming an obligation binding on the voter's honor and conscience. Such obligation inheres in the very nature of his act, entirely regardless of any express pledge, and entirely regardless of the requirements of any statute. The obligation, like the promise exacted by the statute when treated as governing future conduct, is for co-operation in good faith to secure the success of the nominee. There is no reasonably certain measure of bona fide co-operation in matters of this sort. The voter's conduct must be determined largely by his own peculiar sense of propriety and of right. It is for such reasons that the courts do not undertake to compel performance of the obligation. Being unenforceable through the courts, the obligation is a moral obligation. *Herriott v. Potter*, 115 Iowa, 648, 89 N.W. 91, 92. As stated by the Supreme Court of Pennsylvania:

"A moral obligation in law is defined as one which cannot be enforced by action, but which is binding on the party who incurs it, in conscience and according to natural justice." *Bailey v. Phila.*, 167 Pa. 573, 31 Atl. 925, 926, 46 Am. St. Rep. 693.

"(6) Moreover, we think the legislative intent ought to be plain before ballots are held forbidden which reflect conscientious changes in party fealty. Grave doubt might arise as to interference with the privilege of free suffrage guaranteed by our Constitution should the statute be construed as invariably requiring the casting of certain ballots. In rejecting

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that construction, we avoid any serious question of the validity of the statute and follow the rule:

"That where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter." U. S. v. Del. & H. Co., 213 U. S. 408, 29 Sup. Ct. 536, 53 L. Ed. 849.

"We do not say that circumstances might not arise under which one who had participated in a primary would be relieved of the moral obligation which is ordinarily incurred not to undertake the nominee's defeat.* * * * *"

We concur in the conclusion of the Supreme Court of Texas that the obligation incurred by a voter in the primary election is an obligation that is completely unenforceable. We also concur that a moral obligation is created. Whether or not a voter wishes to ignore this obligation is a matter which must be decided by his own conscience and sense of honor.

CONCLUSION

It is, therefore, the opinion of this office that a person voting in a primary election morally obligates himself to support the nominee of the primary in which he participates. However, this obligation cannot be enforced by any court of law.

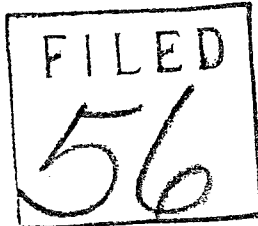
This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:lvd

CRIMINAL LAW: A person who knowingly obstructs a public high-
HIGHWAYS: way by parking a trailer, housing a business
enterprise, upon the right of way is subject to
prosecution under Section 229.150, RSMo 1949.



June 17, 1954

Honorable Douglas Mahnkey
Prosecuting Attorney
Taney County
Forsyth, Missouri

Dear Sir:

Reference is made to your request for an official opinion from this office as to the applicability of Section 229.150, RSMo 1949, to a stated factual situation. Your request reads as follows:

"The community of Rockaway Beach is not incorporated as town or city. Heavy resort business during the summer. A sixty foot street runs the full length of the Beach, being dedicated to the public by the owner, in duly recorded plat. This street follows the old county road.

"Numerous persons have set up little booths and other business places on the side of the road or street, on the right of way but out of the lane of traffic. There has been objection to a certain shooting gallery which is actually a trailer parked on the right of way (presuming this is actually on the right of way).

* * * * *

"QUESTION: Would Section 229.150 R.S.MO. 1949, or any other criminal section apply to this use of the right of way so long as traffic was not obstructed?"

We assume for the purpose of this opinion that the trailer to which you refer is, in fact, actually upon the right of way

Honorable Douglas Mahnkey

as you have indicated, and that the road or street referred to is actually a public road or street.

Section 229.150, RSMo 1949, reads as follows:

"1. All driveways or crossings over ditches connecting highways with the private property shall be made under the supervision of the overseer or commissioners of the road districts.

"2. Any person or persons who shall wilfully or knowingly obstruct or damage any public road by obstructing the side or cross drainage or ditches thereof, or by turning water upon such road or right of way, or by throwing or depositing brush, trees, stumps, logs, or any refuse or debris whatsoever, in said road, or on the sides or in the ditches thereof, or by fencing across or upon the right of way of the same, or by planting any hedge or erecting any advertising sign within the lines established for such road, or by changing the location thereof, or shall obstruct said road, highway or drains in any manner whatsoever, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment.

"3. The road overseer of any district, or county highway engineer, who finds any road obstructed as above specified, shall notify the person violating the provisions of this section, verbally or in writing, to remove such obstruction. Within ten days after being notified, he shall pay the sum of five dollars for each and every day after the tenth day if such obstruction is maintained or permitted to remain; such fine to be recovered by suit brought by the road overseer, in the name of the road district, in any court of competent jurisdiction."

It is our opinion that if such is the case and if said trailer would constitute an obstruction that the person

Honorable Douglas Mahnkey

responsible for the placing of the trailer in this location would not be excused from prosecution under this provision by reason of the fact that traffic was not obstructed.

Every person has the right to go over or upon any part of the highway and is not restricted to that portion which is ordinarily or customarily traveled. This proposition is announced in the case of State v. Campbell, 80 Mo. App. 110, 1.c. 113, as follows:

"* * * Any encroachment upon any part of the highway, whether upon the traveled part thereof or on the sides comes clearly within the idea of nuisance. Every person has a right to go over or upon any part of the highway, and the fact that from notions of economy, or otherwise, the public authorities having the same in charge have not seen fit to work the whole of it, does not alter or change the right. A traveler has the right to go anywhere on the right of way outside of the beaten track of the highway if he so chooses, and any obstacle placed in the way of his doing so is an infringement and obstruction of a public right, and an annoyance and therefore a public nuisance."

See also State v. Asbell, 192 S.W. 469, and State v. Feitz, 154 Mo. App. 578.

Whether or not the trailer to which you refer constitutes an obstruction presents a different question. The general rule in regard to what constitutes an obstruction is announced in the Campbell case, noted supra, in the following terms:

"The obstacle must however, be of such a character and kind as to operate as an obstruction to public travel, or to public rights, or to endanger the safety of persons traveling there, or as to offend and annoy those who come in contact with it.

* * *

We are of the opinion that a trailer housing a shooting gallery located upon the right of way would constitute an obstruction as contemplated by Section 229.150, since it would

Honorable Douglas Mahnkey

preclude a person or persons from using, for the purpose of travel, such right of way.

CONCLUSION

Therefore, it is the opinion of this office that a trailer, housing a business enterprise, which is parked upon the public highway although not upon the regularly traveled part thereof, would constitute an obstruction of the public way and the person responsible therefor would be subject to prosecution under the provisions of Section 229.150, RSMo 1949, which makes it a misdemeanor for any person to wilfully or knowingly obstruct the public way.

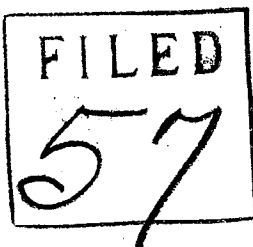
The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG/vtl

RECORDER OF DEEDS: Deputy recorder has no authority to record
DEPUTY: instruments after the death of the officeholder
PUBLIC RECORDS: by whom he was appointed; such attempted
recording may not be given legal effect by
a subsequent ratification of person appointed
to fill the vacancy.



January 28, 1954

Mr. Frank W. May
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office, which request reads, in part, as follows:

"As you no doubt know, Forrest Robinson, Recorder of Deeds of St. Francois County, passed away on December 20, 1953, and no successor has been appointed to fill that office up to the present time. As a result a question has come up, upon which I am requesting an official opinion.

"In order not to bring this important office to a standstill, Mr. Robinson's chief deputy has kept the office open and doing business, since the death of her principal. However, it would seem that death would revoke this agency, as it would any other, and the deputy, while acting in good faith, has only the barest color of authority.

"The question is, what has been the effect, if any, of the recording of instruments by the chief deputy? Will all instruments recorded during this period have to be re-recorded? Will the successor in office who will be appointed under Article IV, Section 4 of the Constitution of Missouri, have to ratify the acts of this chief deputy, in order to give them legal effect?"

Mr. Frank W. May

We assume for the purpose of discussion that certain instruments were entered in the records by a duly appointed deputy after the death of the recorder by whom he was appointed. The question then is what effect is to be given to such entries? In other words, have these instruments been properly recorded?

Section 59.010, RSMo. 1949, provides that there shall be an office of recorder in each county in the state. Section 59.120, RSMo. 1949, provides that the recorder "shall record all instruments of writing authorized and required to be recorded," in books furnished by the county court. Section 59.330, RSMo. 1949, provides "it shall be the duty of the recorder to record:" then proceeds to enumerate certain instruments. Section 59.400, RSMo. 1949, specifies the manner in which a reporter shall place an instrument upon record. Section 59.600, RSMo 1949, provides a penalty for failure of the recorder to perform the duties imposed by Chapter 59.

Reading the above noted provisions, in connection with other provisions, relating to the office of recorder of deeds, we are led to the conclusion that the duties imposed by the recording acts are personal to the person duly elected, qualified and occupying the office.

The rule in regard to the acts of deputies in this state is stated in the case of Halter v. Leonard, 223 Mo. 286, l.c. 293, as follows:

"* * *It is a well settled rule of law that all official acts done by a deputy should be done in the name of the principal. 'A deputy is one who, by appointment, exercises an office in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable.' (9 Amer. and Eng. Ency. Law (2d), 369; Carter v. Hornback, 139 Mo. 238.)"

Following this rule to its logical conclusion it would, of course, be apparent that a deputy could not act as such in the absence of a principal in existence. Noting specifically such conclusion the court in the case of Herring v. Lee, 22 W. Va. 661, l.c. 667, said:

"* * *These definitions clearly show that there must be an officer or principal in existence and capable of acting for himself at the time the deputy or agent is acting for him. When the

Mr. Frank W. May

officer or principal is dead and that fact is known or he is otherwise disqualified to act for himself he cannot act by deputy or agent. Hunt v. Rousmanier, 8 Wheat. 174; Story's Ag. Sec. 488. So if in any manner the principal's power over the office or subject-matter of the agency becomes extinct, the authority of the deputy or agent to act also ceases. Story's Ag. Sec. 499. This must be so of necessity; for unless there is an office in the possession or under the control of the officer he cannot perform the duties of his office, and to hold that the officer could act by deputy in such case would be to hold that he could do by deputy what he had not the power to do himself. Such a position is contrary to both law and reason. * * *

See also 43 Am. Jur. Public Officers, Sec. 460, page 219, wherein it is stated:

"* * *His principal is responsible for his acts, he is removable at the pleasure of his principal, and his authority ceases at the latter's death or disqualification. * * *

It is also stated that entries made in a record book by an unauthorized person are void. We note 76 C.J.S., Records, Sec. 17, page 123, wherein the rule is stated as follows:

"In order to constitute a valid record it must be made by an officer having the authority to do so, or, as stated otherwise, it is essential that it be made by the person whose duty it is to make the record, or the transcription of an instrument into the record books must be made by or under the superintendent of the officer therefor. An entry made in a record book by an unauthorized person is void. * * *

In view of the foregoing cited cases and authorities, we are of the opinion that in the instant case the authority of the deputy ceased at the death of the recorder, consequently, the acts of the deputy in placing certain instruments in the record book are void and of no effect being without authority of law.

Mr. Frank W. May

You next inquire whether the person appointed to fill the office may ratify the acts of this deputy to give them the required legal effect. We, in this regard, refer to two recognized rules of the Law of Agency, (1) the existence of a principal at the time an act is performed is essential to the ratification of the Act, (2 C.J.S. Sec. 40,) and, (2) there can be no ratification of an act which could not have been legally done by the ratifier himself in the first instance. 2 C.J.S., Agency, Sec. 37, page 1074.

Applying the above noted rules it is our opinion that the person to be appointed to fill the vacancy cannot ratify said acts since the deputy was not purporting to act for a principal in existence. Furthermore, the appointee could not ratify and give effect to acts prior to his appointment since he himself had no authority to act as of that time.

CONCLUSION

Therefore, it is the opinion of this office that instruments placed in the record book by a deputy recorder after the death of the officer by whom he was appointed and prior to the time that the vacancy in office is filled as provided by law, are without sanction of law and void.

We are further of the opinion that such acts may not thereafter be given legal effect by subsequent ratification of the person appointed to fill the vacancy.

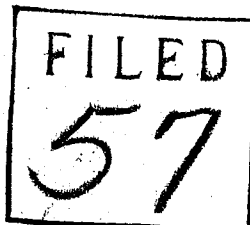
This opinion, which I hereby approve, was written by my assistant, Mr. Donal D. Guffey.

Yours very truly,

DDG:mw

JOHN M. DALTON
Attorney General

7-2-54
TAXATION, County not liable for Federal Withholding Tax if
COUNTIES: withheld tax is not paid to county.



June 14, 1954

Mr. Frank M. May
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

You have requested an opinion in regard to the payment of federal withholding tax on the salary of deputy recorders. The pertinent part of your request is as follows:

"The local representative of the Director of Internal Revenue has presented a bill to the County Court for payment of Withholding Tax for employees of the late Mr. Robinson for the calendar quarters ending September 30, 1953 and December 31, 1953. Withholding Tax has always been paid in the past by the Recorder personally, and it would appear that the clerks in that office were employees of the Recorder rather than of St. Francois County.

"However, since any surplus over the statutory fees of the Recorder, and his office help, is supposed to be turned over to the County, perhaps the County can be held responsible for this Withholding Tax.

"The County Court of St. Francois County will not hesitate to pay this Withholding Tax to the Federal Government, provided it is proper for them to do so under the circumstances outlined above.

"The question to be determined then is this: Are the Clerks in the office of the Recorder

Mr. Frank M. May

of Deeds employees of the office-holder, in which case the office-holder or his estate is liable for payment of Withholding Tax, or are there clerks employees of St. Francois County, in which case it is proper for the County Court to pay Withholding tax on the wages earned by said clerks?"

In addition to the above we refer also to your supplemental letter dated May 22, 1954 which is as follows:

"No funds were ever turned back into St. Francois County as a surplus over the allowed amount by the late Forrest Robinson during any quarter of the year 1953.

"No money was ever withheld from the pay of Mr. Robinson's deputies for Federal Income Tax, or for any other purpose.

"I hope this information will clear up any misunderstanding that might exist in this matter."

It is provided in RSMo 1949, Section 59.250 as follows:

"The recorder in counties of the third class, wherein there shall be a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all fees received by him, over and above the sum of four thousand dollars except those set out in section 59.490, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury."

It must be noted here that this above-quoted Section has been re-enacted by Missouri Revised Statutes, Cumulative Supp. 1953, A. L. 1953, S. B. 42, which reads as follows:

Mr. Frank M. May

"1. The recorder of deeds in counties of the third class, wherein there is a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received. He shall make a report thereof each year to the county court.

"2. All other fees over and above the sum of four thousand seven hundred fifty dollars, for each year of his official term, seven hundred fifty dollars of which shall be compensation for the performance of duties imposed by section 59.365 and four thousand dollars for other duties imposed by law, shall be paid into the county treasury after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary."

Both of the above sections are cited inasmuch as the 1953 section became effective during the time encompassed by the withholding periods stated.

In regard to whether the employer is to be considered the recorder or the county, it is believed that the language of our Supreme Court decides the question. In the matter of State ex rel. Vernon County v. King, 136 Mo. 309 l.c. 318, Judge McFarlane stated as follows:

"Under these provisions, is a recorder entitled, as a matter of right, to retain out of the fees of his office an amount sufficient to pay reasonable compensation to necessary assistants, or is the allowance left entirely to the discretion of the county court."

and at l.c. 319-320:

"We are of the opinion, therefore, that

Mr. Frank M. May

the allowance to the recorder of reasonable compensation for necessary hire of assistants was not a matter of mere discretion with the county court. In his settlement, the recorder was entitled to a credit for the amount so paid; and, if such credit had been given, there would be, at most, but a small amount, if anything, due the county."

The Federal statute law in regard to the responsibility for the withholding and for the payment of income taxes is to be found in Title 26, USCA and it is believed that the applicable law as to political subdivisions is contained in Title 26, USCA, Section 1624 which is as follows:

"If the employer is the United States, or a State, Territory, or political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, the return of the amount deducted and withheld upon any wages may be made by any officer or employee of the United States, or of such State, Territory, or political subdivision, or of the District of Columbia, or of such agency or instrumentality, as the case may be, having control of the payment of such wages, or appropriately designated for that purpose."

In regard to the collection of income taxes at source the liability of the "employer" is stated in Title 26, Section 1623 as follows:

"The employer shall be liable for the payment of the tax required to be deducted and withheld under this subchapter, and shall not be liable to any person for the amount of any such payment."

Mr. Frank M. May

From the foregoing it may be noted that the control of the payment of the wages is a condition on which the Federal law fixes the duty to collect Federal taxes.

In regard to the liability of such a collector the Circuit Court of Appeals in the matter of USF and G Company v. United States, 201 Federal 2d 118 at l.c. 120, states as follows:

"Thereafter there remains only his liability for the tax which he has collected. That is the tax liability for which he alone is liable to the Government as for any other taxes which he may owe."

And in Merrick v. Hoffman, 205 Federal 2d 365, l.c. 368 it is stated:

"But withholding taxes are income taxes which the employer must deduct from the wages of employees and for the payment of which the employer is liable to the government."

The last two above quotations serve to indicate the responsibility for payments of withholding taxes to the collector of revenue and establish that the taxes are the liability of the employer, the employer who pays the salaries.

Since the foregoing authorities seem to establish the responsibility upon the recorder as an employer and as the person charged by law with the withholding of taxes from the wages which he pays, the responsibility it is believed cannot be considered to shift to the county in the event the withholding was not made, or as said in the supplemental letter, no settlement was made with the county into which if it had been withheld the withheld portion could have been intermingled.

In further consideration of the question of the liability of the county for withholding tax of deputy recorders it is thought that one further Federal statute is involved here. Title 26, Section 3661 provides as follows:

"Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over

Mr. Frank M. May

to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose."

The county, in accordance with the supplemental letter received no funds whatsoever from the recorder. There could have been no such special fund in trust for the United States. No such funds were ever withheld.

CONCLUSION

It is therefore the opinion of this office that in accordance with the Federal Statutes, Federal Withholding Tax is required to be withheld by a recorder of deeds of a third class county from the salaries, fees and emoluments paid to deputy recorders. The county is not liable for the tax in the event he fails to withhold from the salaries of his deputies when he has paid no funds into the county from his office.

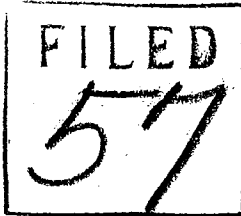
The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Faris.

Yours very truly

JOHN M. DALTON
ATTORNEY GENERAL

JWF:A

JUVENILE COURTS: Circuit clerk to perform clerical work arising in cases heard by juvenile court.



December 31, 1954

Honorable Frank W. May
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"Under Section 211.380 of R.S. Mo. 1949 the Court costs in juvenile matters not collected as provided by law are to be paid by the County.

"No provisions are made under this Section or any other Section pertaining to juveniles concerning the clerical work involved in handling these cases. The question has come to us whether this clerical work should be performed by the County Treasurer as in criminal cases or by the Circuit Clerk as in civil cases.

"Our question is, who should do the clerical work, the Circuit Clerk or the County Treasurer?"

We believe that your opinion request is answered by a provision appearing as a part of Section 211.320, RSMo 1949. The portion referred to reads as follows:

" * * * The clerk of the Cape Girardeau court of common pleas and the clerk of the circuit court in such counties, shall act as the clerk of the juvenile court. * * *"

"Such counties," as used in the section mentioned, refers to all counties of the third and fourth class operating under

Honorable Frank W. May

the procedure outlined in Sections 211.310 to 211.510, inclusive, RSMo 1949. We note that St. Francois County is one of the third class in accordance with the classification of counties adopted by the General Assembly.

CONCLUSION

In the premises, it is our opinion that the circuit clerk in counties of the third and fourth classes is to perform all clerical work incident to the hearing and determination of cases heard by the juvenile court.

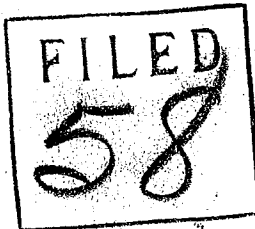
The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

CONSTABLES:
ST. LOUIS COUNTY:



No authority exists for the election or the appointment of more than four constables in St. Louis County, regardless of the fact of the creation of five magistrate districts in St. Louis County.

February 16, 1954

Honorable John J. McAtee
County Counselor
Law Department
Courthouse
Clayton, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"St. Louis County, Missouri, presently has four Magistrates and four Constables. Due to the population increase, the Board of Election Commissioners of St. Louis County is presently redistricting the County into five Magistrate Districts, under the provisions of Article V, Section 18 of the Constitution, and the Statutes.

"The number of Magistrates, when the Election Board completes its task, will have been increased from four to five. The question has arisen, however, as to the number of Constables that shall be elected in the County when the present four Districts are changed to five Magistrate Districts.

"The St. Louis County Charter adopted by the voters of St. Louis County in 1950 under the provisions of Article VI, Section 18 (a) of the Constitution, provides in Article II, Section 3:

'The following County Officers shall be elected: Assessor, Circuit Clerk, Collector, four Constables, Coroner, seven Councilmen, County Clerk, heretofore known as the Clerk of the County

Honorable John J. McAtee

Court, County Supervisor, Highway Engineer, Prosecuting Attorney, Public Administrator, Recorder of Deeds, Sheriff, Superintendent of Schools, and Treasurer.'

"Section 4 provides:

'The above named elective County Officers, except the Superintendent of Schools, shall be nominated and elected for a term of four years in the manner provided for State and County Officers. The Superintendent of Schools shall be elected in the manner provided by law. Each shall have all the powers and perform all the duties provided by law, except as otherwise provided by this Charter.'

"Section 18 (e) of Article VI of the Constitution provides:

'Laws shall be enacted providing for free and open elections in such counties, and laws may be enacted providing the number and salaries of the judicial officers therein as provided by this constitution and by law, but no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees.'

"Chapter 63 of the Revised Statutes of Missouri, 1949, covers the law relating to Constables in counties of the first class. Section 63.010 provides:

'In all counties of this state of the first class as provided by law there shall be elected at the general election to be held at the first Tuesday, in November, 1946, and each general election every four years thereafter, in each magistrate district in such counties a constable who shall hold office for a term of four years and until his successor is duly elected, commissioned and qualified.'

Honorable John J. McAtee

"Thus, the Statutes of Missouri contemplate and provide for a constable to be elected in each Magistrate District in counties of the first class. Yet, the Charter provides, in Section 3 of Article II for only four Constables. Then follows the provisions of Section 18 (e) of Article VI of the Constitution which sets forth '...no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees.'

"It would appear, therefore, that despite the number of magistrates and magistrate districts in St. Louis County, there would only be four constables.

"It is difficult to determine what the intention of the framers of the St. Louis County Charter was when they wrote in this provision. Obviously, if they wanted to provide for a constable in each magistrate district they could have so worded the Charter. It was apparent to those gentlemen even then back in 1949 and 1950 that St. Louis County was growing at a rate which would probably soon require a revision of the magistrate districts. On the other hand, because there were four constables at the time the Charter was drafted, they may have just included the number in existence at that time, to be included in the Section on elective County Officers.

"This office would appreciate your opinion on this subject, as to whether or not the creation of an additional magistrate and magistrate district will require the election of an additional constable for the newly created district."

On October 30, 1953, this department rendered an opinion, a copy of which is enclosed, to Honorable Stanley Wallach, Prosecuting Attorney of St. Louis County. The question asked in that opinion request was whether the St. Louis County Council could legally enact an ordinance providing for the appointment of "special deputy constables." In answer to that question you will note in our opinion that we directed attention to Section 18 (e) of Article VI of the Constitution of Missouri, which you also quote in your letter, which refers to a county of more than 85,000 and which provides that laws may be enacted providing the number and salaries of judicial officers, but not for any other

Honorable John J. McAtee

county office or employee of the county. In that opinion we also held that "special deputy constables" are not judicial officers, from which it would of course follow that a constable is not a judicial officer, since the powers and duties of a "special deputy constable" would be the same as those of constable.

You will also note that in the Wallach opinion we held that all provisions of Chapter 63 RSMo. 1949, purporting to provide for constables and deputies in first class counties operating under a charter form of government, such as St. Louis County, are unconstitutional and of no effect.

We feel, too, that it might be well to call attention to Section 18 (a) of Article VI of the Constitution of Missouri, which reads:

"County Government by Special Charter--
Limitation.--Any county having more than
85,000 inhabitants, according to the cen-
sus of the United States, may frame and
adopt and amend a charter for its own
government as provided in this article, and
upon such adoption shall be a body corporate
and politic."

Also to Section 18 (b) of Article VI, which reads:

"Provisions Required in County Charters.--
The charter shall provide for its amendment,
for the form of the county government, the
number, kinds, manner of selection, terms of
office and salaries of the county officers,
and for the exercise of all powers and duties
of counties and county officers prescribed by
the Constitution and laws of the state."

From the above, it will be seen that the St. Louis County Charter provides for the number and kind of its county officers. As you point out in your letter, that charter, Section 3 of Article II, provides for four constables, which number cannot be increased without an amendment of the charter in that respect. We have examined the charter with a view of determining whether any other portion of it was applicable to the instant situation, and are unable to find any which are applicable.

CONCLUSION

It is the opinion of this department that no authority exists for the election or the appointment of more than four constables in St. Louis County.

Honorable John J. McAtee

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

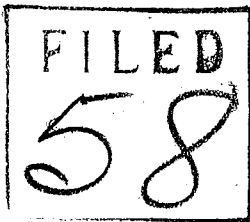
John M. Dalton
Attorney General

HPW/ld/vtl

Enclosure

CIVIL DEFENSE:

Funds of the City of St. Louis deposited with the State Treasurer as trustee to be applied on a particular project application on civil defense and remaining unexpended on June 30, 1954, should be disbursed as directed by the proper authorized official of the City of St. Louis.



April 26, 1954

Mr. Arthur S. McDaniel
Director, Civil Defense Agency
Jefferson Building
Jefferson City, Missouri

Dear Mr. McDaniel:

This is in response to your request for opinion dated March 17, 1954, in which you have submitted a question with regard to the disposition of certain funds placed in your hands by the City of St. Louis. The background of this question is adequately covered by a letter which you enclosed directed to you by Brigadier General F. P. Hardaway, Director of Civil Defense for the City of St. Louis, a portion of which we here-with quote:

"As you pointed out in MOODA Bulletin No. 103, dated 26 January 54, the deadline on completing action on all fiscal year 1952 Matching Fund Requests, is on or before June 30. This deadline has been established by FCDA, we assume under the regulations of the Comptroller General, and is based on the use of federal funds for two years after the appropriation date.

"This deadline, however, poses two specific problems to the City of St. Louis, particularly in regard to those funds which the city has deposited with the State Treasurer as Trustee. As an example, under Project Application No. 7M2AW2, FCDA deposited \$65,079.50 as an advance, whereas the City of St. Louis deposited the sum of \$68,078.55 for a total on this project application of \$133,258.05. To date a total of \$121,198.53 has been expended from this fund, leaving a balance of \$12,059.52. Of this balance \$4,480.24 is federal money and \$7,579.28 is St. Louis money. It is assumed that almost

Mr. Arthur S. McDaniel

all procurement action has been completed on this request and that, therefore, in the main these sums will revert to FCDA and St. Louis respectively as of June 30, 1954.

"With this background I would like to ask two specific questions:

"1) Is it possible to leave this city surplus in the trustee account as of June 30, 1954, for the purpose of paying maintenance costs of the St. Louis Attack Warning System on a continuing basis until such funds are exhausted?

"2) Is it possible to transfer this surplus of unexpended city funds to another project application for fiscal year 1954? In other words, could we apply this \$7,579.28 (as an example) to our request MO 4T4 for the erection of a Rescue School?"

Your position with regard to the questions submitted by General Hardaway is stated in the second paragraph of your opinion request, which we now quote:

"We know that any FCDA funds remaining beyond the date of June 30, 1954, will be returned to the Federal Government. As explained to you, our position is that the \$7,579.28, which is St. Louis' money in its entirety, can only be used by this Agency as directed by the City of St. Louis through its Civil Defense Office. We believe, since they have put up this money with this Agency which is held in a special fund in the Treasurer's Office, that the only authority we will need to use it will come from the City of St. Louis."

There is no question but that on June 30, 1954, those federal funds allocated to Project Application No. 7M2AW2 remaining unexpended will revert to the federal government to be reallocated to other states under applicable FCDA regulations. Nor is there any question but that those funds contributed by the City of St. Louis for the purpose of the above project application remaining

Mr. Arthur S. McDaniel

unexpended on June 30, 1954, remain the property of the City of St. Louis and do not become state money in any sense of the word. (See Attorney General's opinion dated February 14, 1952, directed to Honorable Ralph W. Hammond.) These funds are held by the State Treasurer merely as trustee for the City of St. Louis.

Inasmuch as there is no question of matching federal funds involved, the federal regulations with regard thereto have no application here. Since they are not state funds but do remain the property of the City of St. Louis, hence subject to the control of the City of St. Louis, it would seem clear that the City of St. Louis could direct the disposition to be made of those funds.

We cannot decide herein what official of the City of St. Louis may be authorized to direct the disposition to be made of the funds of the City of St. Louis remaining in the hands of the State Treasurer on June 30, 1954, because that would be governed by the applicable ordinances of the City of St. Louis and the restrictions, if any, under which these funds were appropriated to the use of the Civil Defense Agency of the City of St. Louis.

As far as your office is concerned, however, it is the opinion of this office that you may make such disposition of the funds in question as you are directed to make by the proper official of the City of St. Louis authorized by the city to direct the expenditure of these funds.

CONCLUSION

It is the opinion of this office that funds of the City of St. Louis deposited with the State Treasurer as trustee to be applied on a particular project application on civil defense and remaining unexpended on June 30, 1954, should be disbursed as directed by the proper authorized official of the City of St. Louis.

This opinion, which I hereby approve, was prepared by my Assistant, John W. English.

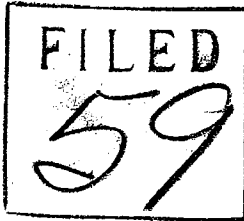
Very truly yours,

JOHN M. DALTON
Attorney General

JWI:ml
Encs.

UNIVERSITY OF MISSOURI:
APPROPRIATIONS:
MEDICAL SCHOOL AT MISSOURI
UNIVERSITY: BOARD OF CURATORS:

Funds appropriated under Section 7.031, Laws of 1953, may be used to enlarge and improve existing power and heating plant owned and operated by and serving the University of Missouri in order to serve heat and power needs of the new Missouri University four-year medical and surgical school.



January 28, 1954

Honorable Powell B. McHaney
President of the Board of
Curators
University of Missouri
Columbia, Missouri

Dear Mr. McHaney:

Following is our opinion on your request of December 21, 1953:

Under Section 7.031, H. B. No. 384, 67th General Assembly, there is appropriated a certain sum for the use of the Board of Curators of the University of Missouri:

"* * * for the purpose of completing a four year medical and surgical school, including the purchase, construction or acquisition of necessary buildings and equipment; * * *."

Under Section 45, H. B. No. 465, 67th General Assembly, a certain sum is appropriated for use by the Board for:

"* * * establishing and maintaining a four year medical and surgical school, the construction or acquisition of necessary buildings, the purchase of necessary equipment, * * *."

Now the question posed by the Board is whether these provisions will permit the use of a portion of this money in the enlargement and improvement of a presently existing power plant, owned and operated by the University and serving the present power needs of the University, to meet the needs of the proposed new medical school in addition to those of the rest of the University.

Honorable Powell B. McHaney

The alternative is to construct an entirely separate smaller power plant, to serve the medical school only. Expert opinion, adopted by the Board, is that the former is the less expensive, more practical, and altogether more desirable course. The Board contemplates the expenditure of \$537,000.00 to make improvements and additions to the present heating and power plant, which sum is believed by the Board to be a fair portion of the total plant to be borne by the medical school.

In the premises, it is the view of this office that the Board of Curators of the University of Missouri may lawfully enter into contracts which provide for the expenditure of a portion of the funds appropriated by Sections 7.031 and 45, respectively, of House Bills Nos. 384 and 465, or either of them, for improvements, additions and enlargement of the structure housing the present heating and power plant now owned and operated by and serving the University, and for the purchase or acquisition and installation of new or other equipment therein, such work having been found by the Board of Curators to be necessary to meet the heating and power needs of the four-year medical and surgical school. Such improvements and additions are well within the language of the appropriation bills, as the "purchase, construction, or acquisition of necessary buildings and equipment;" (H.B. No. 384), and as "the construction or acquisition of necessary buildings, the purchase of necessary equipment." (H.B. No. 465).

We do not believe that the Board of Curators, under these appropriation measures, is required to construct or acquire separate buildings and separate equipment, and to maintain strict physical separation of the medical school and the remainder of the University.

This expenditure of funds, and the resulting improvements to the power plant, should be directly related to the needs of the medical school, and for its service - although it is no objection that the remainder of the University is incidentally benefitted thereby. We do not wish to be understood to say, however, that these appropriations may be used in a program for rehabilitation of the total plant which is not directly related to the medical school needs.

CONCLUSION

Funds appropriated under Section 7.031 of House Bill No. 384, 67th General Assembly, and Section 45 of House Bill No. 465, 67th General Assembly, may be used to enlarge and improve existing power and heating plant owned and operated by and serving the University of Missouri, in order to serve

Honorable Powell B. McHaney

heat and power needs of the new medical school. It is not required, under these appropriation measures, that any heating and power plant serving the medical school be kept separate from the one serving the remainder of the University. However, the expenditure and improvements should be directly related to the medical school needs and should be for the primary purpose of serving those needs.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

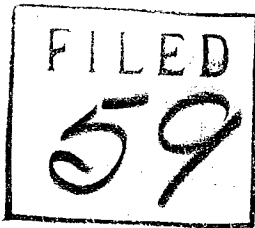
Very truly yours,

JOHN M. DALTON
Attorney General

WDK:hr

CRIMINAL PROCESS:
CUSTODY:

A person arrested without warrant may not be held beyond the twenty hour period unless charges are preferred against him by a person competent to testify against the accused, and a warrant issued. When such twenty hour period expires on Sunday, a magistrate may entertain charges filed by a person competent to testify against the accused, and issue such warrant.



March 1, 1954

Honorable Roy W. McGhee, Jr.
Prosecuting Attorney
Wayne County
Greenville, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"I would appreciate an opinion from your office on the following matter.

"Sec. 544.170, RSMo. 1949, specifies, in part, as follows:

'All persons arrested and confined.... without warrant or other process,.... shall be discharged from said custody within twenty hours from the time of such arrest, unless they shall be charged with a criminal offense by the oath of some credible person, and be held by warrant to answer to such offense;....

"Sec. 476, 250, RSMo. 1949, specifies, in part, as follows:

'No court shall be open or transact business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury;....but this section shall not prevent the exercise of the jurisdiction of any magistrate, when it shall be necessary in criminal cases, to preserve the peace or arrest the offender,....

Honorable Roy W. McGhee, Jr.

"A question arises as to the applicability of these two sections when an alleged criminal offender is arrested on a Saturday. Specifically, is it necessary that a warrant be issued before Monday? Is this matter discretionary or mandatory with the magistrate?"

Section 544.170, RSMo. 1949, referred to by you, reads in full as follows:

"All persons arrested and confined in any jail, calaboose or other place of confinement by any peace officer, without warrant or other process, for any alleged breach of the peace or other criminal offense, or on suspicion thereof, shall be discharged from said custody within twenty hours from the time of such arrest, unless they shall be charged with a criminal offense by the oath of some credible person, and be held by warrant to answer to such offense; and every such person shall, while so confined, be permitted at all reasonable hours during the day to consult with counsel or other persons in his behalf; and any person or officer who shall violate the provisions of this section, by refusing to release any person who shall be entitled to such release, or by refusing to permit him to see and consult with counsel or other persons, or who shall transfer any such prisoner to the custody or control of another, or to another place, or prefer against such person a false charge, with intent to avoid the provisions of this section, shall be deemed guilty of a misdemeanor."

The language of the above section is perfectly clear. It states that any person arrested and confined without warrant "shall be discharged from such custody within twenty hours from the time of such arrest" unless they are charged with a criminal offense and are held by warrant to answer such offense. There are no qualifications attached to the above statement of the law. Thus, if a person were arrested without warrant at 10:00 o'clock on Saturday night he would, if no charge was preferred against him, be entitled to discharge twenty hours later, which would be 6:00 o'clock Sunday evening. So much is clear. You inquire whether a magistrate may disregard the twenty hour

Honorable Roy W. McGhee, Jr.

statute and wait beyond the expiration period of twenty hours before issuing a warrant. In view of our holding above, that a person held for twenty hours without charges being preferred against him is entitled to release, we hold that it is mandatory upon the magistrate to issue such a warrant before the twenty hour period expires if the person arrested is to be held.

On this point Supreme Court Rule No. 21.14 states:

"All persons arrested and held in custody by any peace officer, without warrant, for the alleged commission of a criminal offense, or on suspicion thereof, shall be discharged from such custody within twenty hours from the time of arrest, unless they be held upon a warrant issued subsequent to such arrest. While so held in custody, every such person shall be permitted to consult with counsel or other persons in his behalf. If the offense for which such person is held in custody is bailable and the person held so requests, he may be admitted to bail in an amount deemed sufficient by a judge or magistrate of a court of such county or of the City of St. Louis having original jurisdiction to try criminal offenses. Such admission to bail shall be governed by all applicable provisions of these Rules. The condition of the bail bond shall be that the person so admitted to bail will appear at a time and place stipulated therein (which shall be a court having appropriate jurisdiction) and from time to time as required by the court in which such bond is returnable, to answer to a complaint, indictment or information charging such offense as may be preferred against him."

In regard to this matter the Missouri Supreme Court, in the case of State v. Miller, 289 S.W. 898, at l.c. 903, has stated:

"Under the provisions of section 3200, R.S. 1919, the person arrested by a peace officer without warrant on suspicion of having committed a criminal offense is required to be discharged from such custody within 20 hours, unless he shall be charged with a criminal offense by the oath of a credible person, and be held by a warrant to answer for such

Honorable Roy W. McGhee, Jr.

offense. The jurisdiction of the magistrate over such person accrues by the concurrence of a complaint, made as provided by law, and the custody of the person complained against. The jurisdiction of the magistrate over money or property taken by the officer from the person arrested, and jurisdiction over such officer in respect thereto, arise upon the concurrent facts that a criminal cause has been instituted before the magistrate, and that the party charged has been taken into custody."

Section 476.250, RSMo. 1949, to which you refer, reads in full as follows:

"No court shall be open or transact business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury; and every adjournment of a court on Saturday shall always be to some other day than Sunday, except such adjournment as may be made after a cause has been committed to a jury; but this section shall not prevent the exercise of the jurisdiction of any magistrate, when it shall be necessary in criminal cases, to preserve the peace or arrest the offender, nor shall it prevent the issuing and service of any attachment in a case where a debtor is about fraudulently to secrete or remove his effects."

It will be noted that the above section excepts from its prohibition of open courts on Sunday "any magistrate, when it shall be necessary in criminal cases, to preserve the peace or arrest the offender. . . ."

The above, we believe, is ample authority for a magistrate to issue a warrant on Sunday.

CONCLUSION

It is the opinion of this department that a person arrested without warrant may not be held beyond the twenty hour period unless charges are preferred against him by a person competent to testify against the accused, and a warrant issued. It is our further opinion that when such twenty hour period expires on Sunday, a magistrate may entertain charges filed by a person

Honorable Roy W. McGhee, Jr.

competent to testify against the accused, and issue such warrant.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

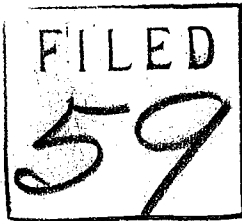
Very truly yours,

John M. Dalton
Attorney General

HPW/vtl

WATER COURSE:
IRRIGATION:

A riparian owner of land abutting on a natural or artificial water course may take water therefrom for purposes of irrigation, and in such quantity as will not unnaturally, sensibly or materially affect the flow of the stream.



April 30, 1954

Honorable Wesley McMurry
Representative
Scotland County,
Rutledge, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"I am directing this letter to you in regard to water rights in the Middle Fabius River, in Scotland County.

"This is a dug canal running through Scotland and adjoining Knox Counties, and I request this information regarding irrigation projects. A constituent has requested information regarding the right to procure water throughout the season from this stream.

"I should like to have your ruling on this, as several persons are contemplating putting in irrigation systems, and will appreciate it if you will advise me on the matter."

While you do not so state, we assume that the persons who contemplate taking water from the Middle Fabius River for irrigation purposes are riparian owners, which is to say, persons who own land abutting upon one, or perhaps upon both, sides of this river.

Certainly a person not a riparian owner would not have any right to usage for this purpose in those jurisdictions where the riparian doctrine prevails.

We shall not here enter into any course of reasoning in an attempt to show that the riparian doctrine does prevail in Missouri. Our courts have always held that the riparian doctrine did prevail in Missouri, and we likewise so hold. We will further note that the riparian doctrine is applicable to both navigable and non-navigable streams. This doctrine is pronounced in the case of Greisinger v. Klinhardt, 9 S.W.(2d) 978, l.c.980. This citation will

Honorable Wesley McMurry

be adduced subsequently in another connection.

We also note that riparian rights attach to artificial as well as to natural water courses. In the case of Greisinger v. Klinhardt, supra, at l.c. 981, the court stated:

"In Brill v. Railroad, 161 Mo. App. 472, 144 S.W. 174, Judge Ellison of the Kansas City Court of Appeals said (loc. cit. 475 of 161 Mo. App. (144 S.W. 175)), quoting from Farnham:

"If the artificial channel is substituted for a natural one, or is created under such circumstances as indicated that it is to be permanent and to be a water course the same as though it was created by nature, riparian rights may attach to it."

"In Ranney v. Railroad, 137 Mo. App. 537, loc. cit. 548, 549, 119 S.W. 484, 488, the St. Louis Court of Appeals, opinion by Judge Goode, held that prescriptive rights might be acquired in an artificial water course, as well as in a natural one, provided the artificial water course was intended to be permanent."

Our question now is whether persons owning land which abuts upon one or both sides of a navigable or non-navigable natural or artificial water course can take water from such water course for irrigation purposes, and if so how much.

A general statement of the law on this matter is found in C. J. Vol. 67, p. 1287, Section 850 et seq., which reads:

"A. Right to Use of Water for Irrigation Generally.- 1. Riparian Owner. - a. In General. In jurisdictions wherein the doctrine of riparian rights obtains every riparian owner on a stream has a limited right to use the water to irrigate his riparian lands. The rights of different riparian owners are coequal in this respect and there is no superiority growing out of prior riparian ownership by one.

"c. Quantity. A riparian owner is not entitled to use the entire volume of the stream to irrigate his lands. Also, he is not entitled to use for irrigation such quantities of water as will deprive lower owners of a sufficient supply for their natural wants or domestic needs or such quantities

as will destroy or materially impair the rights of lower proprietors to use their due proportion of water for the irrigation of their riparian lands. His use of water for irrigation must be reasonable and what is reasonable is ordinarily a question of fact depending on the circumstances of the particular case, although there are some things which are clearly and obviously unreasonable, such as a needless waste of water to the injury of other owners. Reasonableness of use is not affected by the mode of diversion. The quantity of water to which a riparian owner is entitled to use for irrigation is necessarily indefinite, uncertain, and subject to fluctuations; it depends on, and varies with, the volume of water in the stream, seasons and climatic conditions, and the needs of other riparian proprietors, as well as his own needs; and in determining such needs it is necessary to consider the area of irrigable land, and the character of the soil, owned by each riparian proprietor. Where a riparian owner or his grantor acquired title to the land from the government subsequent to the adoption by congress of the Desert Land Act and the statute is applicable to the land, he is entitled, as against a subsequent appropriator, to water for irrigation only to the extent to which he is a prior appropriator."

We are unable to find a single Missouri case which deals with the taking of water from a stream for the purpose of irrigation. There are numerous Missouri cases which hold that one owning land adjacent to a stream, which is to say a riparian owner, may not arrest the flow of the stream, may not divert or obstruct it. We believe that the general principle of Missouri law in regard to the taking of water from a stream is stated in the case of Greisinger v. Klinhardt, 9 S.W. (2d) 978. At l.c. 980, the court stated:

"Considerable argument is offered by the defendants to show that Stout's creek was not a navigable stream, with the apparent inference that therefore no riparian rights inure to owners of the land adjacent the artificial lake made by damming that stream. Riparian rights are not confined to navigable waters. 1 Farnham, 278; 2 Farnham, p. 1565. The right to the flow of a natural nonnavigable stream, in its natural way, applies to upper and lower owners of land across which the stream flows. That may apply with equal force to a stream diverted to an artificial channel. Where the owner of a farm dug a ditch diverting a spring from its natural course so as to cause it to flow over another part of his farm and make a pond, and divided the dif-

ferent portions in severalty, he created dominant and servient tenements as to this water flow, as fully as it existed at his death, and the devisee acquiring the spring had a right to keep open the ditch so as to maintain the status quo. *Schuler v. Weise*, 9 Mo. App. 585."

It will be noted that a riparian owner is entitled on the basis of the above opinion, to the flow of a stream, "in its natural way", which would seem to mean that no other riparian owner could take from a stream sufficient water to "unnaturally" affect its flow. The above case was cited with approval in the more recent case of *Mueller v. Klinhart*, 167 S.W.(2d) 670.

Also in the case of *McIntosh v. Rankin*, 134 Mo. 340, at l.c. 345, the court stated:

"It appears from the petition that the plaintiffs are the owners of a grist mill on a running stream. As such they are entitled to the uninterrupted flow of its waters in their natural channel and the use of its power for their mill, if available for that purpose without injury to others, without express statutory power, and if deprived of that use by the unlawful acts of the defendant set out in the petition a right of action accrued to them for damages for such wrong."

On this point we direct attention to C. J. Vol 67, p. 686, Section 12, through Section 17, which reads:

"Right to Natural Flow. a. Lower Riparian Owner. In the absence of any modification of relative rights by contract, grant, license, appropriation, or prescription, and subject to the paramount sovereign authority of the government, at common law every riparian proprietor is entitled to the natural flow of the water of a running stream through or along his land, in its accustomed channel, undiminished in quantity and unimpaired in quality, except as the accustomed flow may be changed by the act of God, and except as may be occasioned by the reasonable use of the stream by other like proprietors. The governing maxim is that water runs, and ought to run as it has been accustomed to run. This rule does not imply any ownership or property right to the flowing water itself, although it has been said that the waters of a stream are the private property of the owners of the land bordering on the stream, but is merely a right to have it continue in its accustomed channel and volume and to make a beneficial use of it while passing over the land,

to such reasonable extent as will not impair its usefulness to other riparian proprietors. This right to the natural flow is not an easement, nor an appurtenance, but is inseparably annexed to the soil and is part and parcel of the land itself, so that, even though severable from the land, when so severed, the right no longer is a riparian right. Such right is a valuable, vested right so that the owner cannot be deprived thereof except by due process of law and on compensation made. The right is not limited to a body of water which flows in the stream at the period of greater scarcity, but the riparian owner is entitled to the ordinary and usual flow of the stream, including accretions from snows. A riparian owner may not complain of artificial means of supplying the water so long as he secures the same quantity and quality which were furnished by the natural flow of the stream.

"b. Upper Riparian Owner. As against lower riparian owners, upper riparian owners are entitled to have the water flow from their lands to the extent it would naturally flow, subject to reasonable usage by them, unless such right has been curtailed by grant or adverse possession. Such right is an easement.

"6. Right to Use Water. - a. In General. Subject to any paramount right to the use of the water existing under the general law in some other person, a riparian owner has the right to make any use of the water, beneficial to himself, on the riparian land, which his situation makes possible, so long as he does not inflict any substantial or material injury on those below him, and he may facilitate his use of it by any appropriate means; but all the riparian proprietors have an equal or common right to use the water, and each must exercise his rights in a reasonable manner and to a reasonable extent, so as not to interfere unnecessarily with the corresponding rights of others, and water diverted but not consumed by a riparian owner must be returned to the stream before it passes his land. This right is one annexed and incident to the land, being a real or corporeal hereditament, in the nature of an easement. This right to the use of the water does not arise from the fact that the water is flowing, and that any part thereof used is immediately replaced by water from the current above, but arises out of the ownership of the bank, although it exists independently of any claim of ownership of the water,

and from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages, and benefits. It exists independently of use or appropriation. And exclusive rights to the flow of the stream cannot be acquired by mere priority of use. The relative amount of watershed owned by adjoining riparian proprietors does not affect their individual rights to a proper use of the stream. The use must be made only on the parcel to which the riparian rights attach. In the case of riparian owners on opposite sides of a stream forming the boundary, their respective rights to use the water do not result from the fact that the boundary is the center of the stream, but arise by mere operation of law as an incident to the ownership of the bank, and hence the formation of the bed of the stream, its varying depth, and the consequent course and direction of the current are wholly immaterial circumstances. It has been said that any injury to a lower riparian owner incidental to the reasonable use of the stream by a higher riparian owner gives no right of redress, and that a riparian owner who is not injured by the use cannot interfere with it.

"b. Reasonableness of Use. A riparian owner's rights are not measured by the necessities of his own business, but by the rule that his use of the water must be reasonable when considered with reference to the needs or rights of other riparian proprietors on the stream, and any malicious or wanton use or abuse of his water privileges by a riparian owner is unreasonable and actionable. There is no fixed rule of law for determining what will constitute a reasonable use, but each case depends on its own particular facts, and the reasonableness of a particular use is generally a question of fact for the jury, although the use of the water may be so plainly excessive as to be unreasonable as a matter of law. In determining the reasonableness of a particular use it is proper to consider the character and size of the stream, its location, the nature and condition of the improvements thereon, the uses to which it is subservient, the state of civilization, climatic conditions, the

Honorable Wesley McMurtry

custom and usage of the people in the vicinity and elsewhere in regard to the management of business, the hours of labor, and the use of the water of such streams, the nature of the banks, the volume of water, its fall and velocity, the subject matter of the use, its object and extent, the necessity for it, and the previous usage.

"c. Use for Particular Purpose - (1) Natural Wants. Grounded on actual necessity, so long as his use of the water is reasonable in manner and extent, a riparian proprietor is entitled to take from the stream so much water as may be required for his natural wants, or for domestic purposes, such as washing, drinking, cooking, and other household uses, or for watering his animals, regardless of the effect on other riparian owners lower down the stream as diminishing their supply, and even though thereby all the water be consumed. This right is not dependent on whether the dwellers occupy homes or hospitals, or are sheltered by tents, or live in the open, and the same rule has been held applicable to a modified extent, to municipal and other waterworks having the rights of riparian proprietors.

"(2) Artificial Wants. Water may also be used for certain artificial wants, such as irrigation, mining, mechanical, or manufacturing purposes, the development of power for use or sale, the maintenance of a canal, the floating of logs or rafts, or fishing, provided it does not sensibly or materially diminish the quantity."

CONCLUSION

It is the opinion of this department that a riparian owner of land abutting on a natural or artificial water course may take water therefrom for purposes of irrigation, in such quantity as will not unnaturally, sensibly, or materially affect the flow of the stream.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

HPW/ld

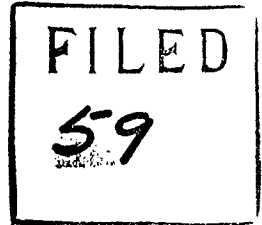
JOHN M. DALTON
Attorney General

CRIMINAL PROCEDURE:
PRESENCE OF DEFENDANT:

Magistrate or circuit court may receive plea of, try, or pronounce sentence upon defendant in misdemeanor cases in absence of such defendant with consent of such court, and the prosecuting attorney.

June 8, 1954

Honorable Roy W. McGhee, Jr.
Prosecuting Attorney
Wayne County
Greenville, Missouri



Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"I have been directed by the county court in one instance and the magistrate in another to obtain your office's opinion on two separate matters, as follows:

"2. Supreme Court Rule 27.08 provides, in part, as follows:

"' . . . If he (the defendant) has been convicted of a misdemeanor, he must be personally present when sentence and judgment are pronounced unless the court and the prosecuting attorney consent to the absence of the defendant. . . .'

"Supreme Court Rule 29.02 provides, in part, as follows:

"' . . . nor shall any person be tried for or be allowed to enter a plea of guilty of a misdemeanor unless he be personally present or the court and prosecuting attorney consent to such trial or plea in the absence of the defendant.'

"Do these two rules allow the magistrate court to accept the plea of and pronounce sentence upon an absent defendant whose appearance is entered by his attorney? Do they allow a defendant to enter a plea by mail? If the answer to either question is in the affirmative, should service of the warrant be waived, and if so, what return, if any, should the sheriff make upon the warrant?" * * *

Honorable Roy W. McGhee, Jr.

With respect to the questions which you have propounded in paragraph number 2 of your letter of inquiry we first direct your attention to Sections 546.550 and 546.560, RSMo 1949, reading as follows:

546.550.

"For the purpose of judgment, if the conviction be for an offense punishable by imprisonment, or imprisonment be assessed as punishment by the jury, the defendant must be personally present; if for a fine only; he must be personally present, or some responsible person must undertake for him to pay the judgment and costs; judgment may then be rendered in his absence.

546.560.

"If the defendant is in custody, he must be brought before the court for judgment; if he is not present when his personal attendance is necessary, the court may order the clerk to issue a warrant for his arrest, which may be served in any county in the state, as a warrant to arrest in other cases."

Also to the provisions of Section 546.030, RSMo 1949, reading as follows:

"No person indicted for a felony can be tried unless he be personally present, during the trial; nor can any person be tried or be allowed to enter a plea of guilty in any other case unless he be personally present, or the court and prosecuting attorney shall consent to such trial or plea in the absence of the defendant; and every person shall be admitted to make any lawful proof by competent witnesses or other testimony in his defense; provided, that in all cases the verdict of the jury may be received by the court and entered upon the records thereof in the absence of the defendant, when such absence on his part is willful or voluntary, and when so received and entered shall have the same force and effect as if received and entered in the presence of such defendant; and provided further, that when the record in the appellate court shows that the defendant was present at the commencement or any other stage of the trial, it shall be presumed, in the absence of all evidence in the record to the contrary, that he was present during the whole trial."

Honorable Roy W. McGhee, Jr.

The effect of these three statutes is that judgment may not be pronounced by a court upon conviction for an offense punishable by imprisonment, which imprisonment has been assessed as a punishment by the jury in the absence of the defendant; and that no defendant may be permitted to be placed upon his trial or to enter a plea of guilty in misdemeanor cases except when personally present or if the court and prosecuting attorney consent to such trial, or the receipt of such plea, in the absence of the defendant.

However, in this regard we direct your attention to the following provisions of Section 5, Article V, of the Constitution of Missouri, 1945:

"Rules of practice and procedure--duty of Supreme Court--power of legislature.--The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to that purpose."

Pursuant to the constitutional authority so conferred the Supreme Court of Missouri has promulgated two rules dealing with the subject matter of the above quoted three statutes. Inasmuch as such rules are, in our opinion, related solely to criminal practice and procedure, it is our opinion that they supersede the provisions of the quoted statutes to the extent of any conflict. We perceive no conflict with Section 546.030, RSMo 1949, in so far as it relates to the matter now under consideration, but do observe a conflict with the other two statutes quoted. Rule 27.08 of the Supreme Court of Missouri reads as follows:

"If the defendant has been convicted of a felony, he must be personally present when sentence and judgment are pronounced. If he has been convicted of a misdemeanor, he must be personally present when sentence and judgment are pronounced unless the court and the prosecuting attorney consent to the absence of the defendant. If the defendant is in custody, he must be brought before the court for judgment and sentence; if he is not present when his personal attendance is necessary, the court may order the clerk to issue a warrant for his arrest, which may be served in any county in the state as a warrant of arrest in other cases."

Honorable Roy W. McGhee, Jr.

Rule 29.02 of the Supreme Court of Missouri reads as follows:

"No person shall be tried upon an indictment or information for a felony unless he be personally present during the trial; nor shall any person be tried for or be allowed to enter a plea of guilty of a misdemeanor unless he be personally present or the court and prosecuting attorney consent to such trial or plea in the absence of the defendant."

Having determined that such rules establish the practice and procedure to be followed we thereupon consider the three questions you have propounded under paragraph number 2 of your letter of inquiry.

Your first question reads: "Do these two rules allow the magistrate court to accept the plea of and pronounce sentence upon an absent defendant whose appearance is entered by his attorney?" Our consideration of the rules quoted supra, lead us to the conclusion that the answer to this question must be in the negative. Such answer, however, is qualified by the following conclusion that such procedure may be followed with the consent of the court and the prosecuting attorney.

Your second question reads as follows: "Do they allow a defendant to enter a plea by mail?" Our further consideration of the quoted rules lead us again to the conclusion that the answer to this question must also be in the negative subject to the same qualification mentioned with respect to question number 1.

Your third question reads as follows: "If the answer to either question is in the affirmative, should service of the warrant be waived, and if so, what return, if any, should the sheriff make upon the warrant?" Having answered questions numbers 1 and 2 in the negative, it becomes unnecessary to answer question number 3.

CONCLUSION

In the premises we are of the opinion:

That a court having jurisdiction of prosecutions for misdemeanors may not accept a plea of, and pronounce sentence upon an absent defendant whose appearance is entered by an attorney, except with the joint consent of such court and the prosecuting attorney; and,

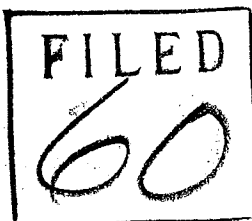
That the defendant may not enter a plea to an information for a misdemeanor by mail except with the joint consent of the court, wherein such cause is pending, and the prosecuting attorney.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

CANCER HOSPITAL: The certification by a county court of a patient to the State Cancer Hospital continues until the patient is cured, is no longer in need of treatment by the hospital, or otherwise discharged, pursuant to Section 200.090 RSMo 1949. If, however, during the course of the disease, the patient moves his residence from one county to another, such removal extinguishes the obligation of the original certifying county, and certification by the new county of residence should be obtained. If a patient, having been discharged, removes his residence to a county other than the county originally certifying him for treatment, said patient may not again be admitted for treatment until properly certified by his new county of residence.



May 20, 1954

Honorable G. W. Meinershagen, M.D.
Acting Administrator
Ellis Fischel Cancer Hospital
Columbia, Missouri

Dear Doctor Meinershagen:

By letter of April 12, 1954, you requested an official opinion in the following manner:

"The law creating the State Cancer Hospital provides the manner in which a patient may apply for admission to the Hospital, how the judges of the county court of residents decide on eligibility of the patient to the Hospital, and how he is to be sent to the Hospital. The law sets forth the billing of the county court for each patient resident in the Hospital for any part of a month and the maximum amount of charge per patient per month.

"After admission to the Cancer Hospital, we routinely follow our patients to determine the status of the disease. If the cancer persists, further treatment may be necessary and is provided if feasible. The follow-up of the patient is done in the clinic and the patient may be admitted to the Hospital from the clinic at any time. This follow-up period may last from five to ten years. Our Social Service Department, who handles the clinic admissions

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and follow-up attempts to determine the latest addresses of all patients who were on our active follow-up list.

"When these patients move from one county to another, the Social Service Department gets a new certification from the new county of residence. Despite our efforts to keep current data on patients, we have them come in to find that they have not lived in the county of original certification for two years or more and do not have time to seek new certification from the new county of residence. The new county of residence may not want to certify this person although we consider the financial of the patient may be the same as when certified from the other county. We occasionally close a case and reopen it on application of the patient with a new disease or an extension of the old disease.

"We have attempted in the past to be sure that there is a current certification from the county of residence of the patient if at any time the residence has been changed. We wonder if this re-certification is necessary and would like to pose three questions for your consideration.

"1. When a patient is certified for admission from a county to the Cancer Hospital, how long is this certification valid? If the patient continues to live in the same county of original certification, does closing the case and reopening it constitute reason for re-certification?

"2. How long does the certification from the original county of residence stand if the patient moves from the original county to another county, that is, does the second county assume the responsibility of the first county or does the certification stand only for only a certain number of months or years from the time they moved from the original county?

"3. When a patient moves from one county to another and several years elapse, what is our

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position if neither county will certify this patient to the Hospital?

"In relation to this last question, it has been our philosophy that once a patient is certified for treatment, that they are our patient until the disease is cured and if their financial status remains the same, we might care for them for life if they have cancer of another site."

Provision for entrance to the State Cancer Hospital is named by Section 200.080, RSMo, Cum. Supp., 1953:

"1. Whenever the existence of a case described in section 200.070 shall come to the notice of the sheriff, health officer, public health nurse, peace officer, or any other public officer, or any physician or surgeon, it shall be his duty to, and any other person may, file with the judges of the county court of the county of the legal residence of such person, or if such person be a resident of the city of St. Louis, then with the corresponding authority of said city, an application for the treatment of such person at the state cancer hospital. Such application shall be made on blanks to be furnished by the state cancer hospital and shall contain a full statement of the financial situation of the person sought to be treated and a general statement of his physical condition.

"2. Upon the filing of such application, the judges of the county court shall make investigation in such manner as they shall deem advisable, and it shall be the duty of any public official of any county, city, town, village or ward of the residence of the person to be treated to supply the judges of the county court on request thereof all information within their knowledge relative to the financial situation of the person sought to be treated. If, after such investigation, said judges of the county court shall be satisfied that the person on whose behalf the application is made is not

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financially able to provide himself with such treatment, or in case of a minor, that his parent, guardian or trustee, or the person having legal custody over him or legally responsible for his support or maintenance is not financially able to provide such treatment, then said judges shall appoint a physician of said county whose duty it shall be to personally make an examination of the person on whose behalf said application for treatment has been filed.

"3. Said physician shall thereupon make and file with the judges of the county court a report in writing, setting forth the nature and history of the case, and such other information as will be likely to aid in the medical or surgical treatment, especially tumors and diseases of a cancerous nature, affecting said person and shall also state in said report whether or not, in his opinion, the condition of such person can probably be alleviated. The report of said physician shall be made within such time as the court may direct, and upon blanks, to be furnished by the administrator of the state cancer hospital for that purpose. Said report shall include any information within the knowledge of said physician relative to the financial condition of the person proposed to be treated. The physician appointed to make said examination, unless he is already a salaried officer of the state or some political sub-division, thereof or municipal corporation therein, shall receive the sum of five dollars for making said examination and in any case shall receive his actual and necessary expenses; which fee and expenses shall be paid by the county of residence of the patient; and it shall be the duty of the county court of such county to provide for such payment.

"4. If, upon filing said report, the judges of the county court shall be satisfied that

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that the patient is one who should be treated at the state cancer hospital and that the person to be treated, or his parent, guardian, trustee or other person having legal custody of his person in case of a minor, is not financially able to provide such person with proper treatment, the judges of the county court shall enter an order finding such facts. In case the court is not satisfied they may take additional testimony or make such further investigation as to them shall seem proper.

"5. Upon the entry of the order of the judges of the county court, approving said application they shall communicate with the administrator of the state cancer hospital and ascertain whether or not the applicant can be received as a patient. If the state cancer hospital can receive such applicant, the court shall thereupon certify their approval of such application to said hospital. In cases coming to the attention of the county judges where proper and timely diagnosis may not be had locally, authority is hereby given to said judges to make proper and necessary orders sending the patient to state cancer hospital for examination; the necessary expense incident thereto to be chargeable to the county of residence of the patient. A copy of each application and a copy of the report of the physician and court order in each case shall be sent to the administrator of said hospital."

The purpose of the State Cancer Hospital is stated by Section 200.070 RSMo 1949:

"The state cancer hospital shall be primarily and principally designed for the care and treatment of indigent persons afflicted with cancer, such

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scientific research as will promote the welfare of indigent patients committed to its care and for the care of legal residents of Missouri only. Where such patient is unable financially to secure such care or, in the case of a minor, where the parent, guardian, trustee or other person having lawful custody of such minor's person, as the case may be, is unable financially to secure such care the state cancer hospital is hereby designated as a place of treatment for such persons."

Turning to your first question, it is our opinion that a certification by the county court is not made for any particular length of time, but instead is valid until the disease is cured, or for so long as treatment by the hospital is needed, or until the patient is otherwise discharged pursuant to Section 200.090 RSMo 1949. By "closing the case" we presume you mean that the patient is discharged pursuant to said Section 200.090. That Section reads as follows:

"Whenever, in the opinion of the administrator of the state cancer hospital, any patient should be discharged therefrom as cured, or as no longer needing treatment, or for the reason that further treatment cannot benefit his case, or for any other reason, said administrator shall discharge said patient. If the patient is unable to return to his place of residence alone, said administrator shall appoint some suitable person to accompany said patient from said hospital to his place of residence. Such person shall receive his actual and necessary expenses, if not a salaried officer of the state or any political subdivision thereof. The traveling expenses of all patients and expenses of such person appointed to accompany such patient shall be part of the legitimate expenses of caring for such patients in the hospital and as such included in the monthly statement to the county court of the county of the residence of the patient."

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If so, we believe that act discharges the obligation of the certifying county, and a new certification by the county court is necessary before the patient can be readmitted.

In answer to your second question, we believe that if the patient changes his residence from the county originally certifying him, that county is relieved of its obligation under the certification. The new county of residence of the patient should be required to certify the patient as if the patient were to be originally admitted from the second county. Having determined that the removal by a patient of his residence to a county other than the one originally certifying him necessitates a certification by the county court of the new county of residence, we turn to your third question as to the position of the hospital if the new county refuses to certify the patient. The Legislature has prescribed a detailed procedure for admission of patients to the hospital, and it is our opinion that since the Legislature has so acted, the maxim of "Expressio unius est exclusio alteritius" must be invoked. That maxim is a fundamental rule in the construction of statutes, and means that the express mention of one thing implies the exclusion of another. An application of this rule was made in *Dougherty vs. Excelsior Springs*, 110 Mo. App. 623, 626, 85 S.W. 112, 113. In that case an attorney sued to recover fees for legal services to defendant city in a damage suit. The statute permitted the mayor and board of aldermen to appoint counsel in addition to the regular city attorney, but plaintiff was appointed by the mayor only. The Kansas City Court of Appeals disallowed the claim, saying l.c. 626:

"The law is well settled that when special powers are conferred, or where a special method is prescribed for the exercise and execution of a power, this brings the exercise of such power within the provision of the maxim expressio unius, etc., and by necessary implication forbids and renders nugatory the doing of the thing specified except in the particular way pointed out. (*Kolkmeier vs. Jefferson City*, 75 Mo. App. l.c. 683; *McKissick v. Mt. Pleasant Twp.*, 48 Mo. App. 416; *Heidelberg v. St. Francis Co.*, 100 Mo. 74.) * * * * *

Therefore, we conclude that the Legislature has provided the exclusive method for admission of patients to the hospital,

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and the hospital can admit only those persons properly certified under the provisions of Chapter 200, RSMo 1949.

CONCLUSION

It is, therefore, the opinion of this office that the certification by a county court of a patient to the State Cancer Hospital continues until the patient is cured, is no longer in need of treatment by the hospital, or otherwise discharged pursuant to Section 200.090 RSMo, 1949. If, however, during the course of the disease, the patient moves his residence from one county to another, such removal extinguishes the obligation of the original certifying county, and certification by the new county of residence should be obtained. If a patient, having been discharged, removes his residence to a county other than the county originally certifying him for treatment, said patient may not again be admitted for treatment until properly certified by his new county of residence.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

FMG:lvd

PROSECUTING ATTORNEY: Prosecuting Attorney may recommend compromise
COUNTY COURT: of claims against county; county court may
effectuate a compromise of claims subject to
valid dispute.



January 11, 1954

Mr. John E. Mills
Prosecuting Attorney
Ralls County
New London, Missouri

Dear Sir:

Reference is made to your request for an opinion of this office. You first refer to Section 56.070, RSMo 1949, relating to the duties of the prosecuting attorney to investigate all claims against the county and inquire:

"1. Is it your opinion that this duty carries with it the implied obligation, that following such investigation, the prosecuting attorney may recommend that the claims be compromised and settled?

"2. If it appears from the evidence that a valid dispute or question of the validity of the claims exists, may the present county court enter into a binding agreement or contract of settlement which would stand in the place of the original contract or agreement and be effective as a contractual obligation incurred by the present court during 1953."

Section 56.070, RSMo. 1949, provides as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested,

Mr. John E. Mills

and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before the magistrate courts, when the state is made a party thereto; provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

While this section does not expressly authorize the prosecuting attorney to recommend that claims be compromised and settled, we are of the opinion that such authorization is granted by implication and we so hold. The general rule in this regard is stated in the case of *State ex inf. McKittrick v. Wymore*, 345 Mo. 169, 132 S.W. 2d. 979, 1.c.c. 987, 988:

"The duties of a public office include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes." 46 C.J. Sec. 301, p. 1035.

"The rule respecting such powers is that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers, as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers." *Throop's Public Officers*, Sec. 542, p. 515.

"Necessary implications and intendments from

Mr. John E. Mills

the language employed in a statute may be resorted to to ascertain the legislative intent where the statute is not explicit, but they can never be permitted to contradict the expressed intent of the statute or to defeat its purpose. That which is implied in a statute is as much a part of it as that which is expressed. A statutory grant of a power or right carries with it, by implication, everything necessary to carry out the power or right and make it effectual and complete, but powers specifically conferred cannot be extended by implication, ' * * *'

It would be a purposeless thing to require the prosecuting attorney to investigate claims against the county if the county which he represents could not have the benefit of his legal knowledge and training in regard to whether the claim should be defended against in a proper judicial proceeding or compromised and settled at less expense to the county.

You next inquire whether the county court may compromise and enter into a contract of settlement of a claim which is the subject of a valid dispute. In answer to this question, we refer you to the case of St. Louis I.M. & S. Railway Company vs. Anthony, 73 Mo. 431. While in this case the state was the initiating party, we believe that the reasoning there applied would likewise be applicable in a case where a claim is sought to be enforced against the county. In its opinion, the court said at l.c. 434:

"It is now contended that the county had no authority to make the compromise in question, or any compromise whatever. We are not of that opinion. The power to sue implies the power to accept satisfaction of the demand sued for, whether the precise amount demanded or less. The taxes were levied for the benefit of the county. The beneficial interest was in the county, and it is for the public interest that she should have the right to settle, by compromise, questionable demands which she may assert. Must the county prosecute doubtful claims at all hazards, regardless of costs and expenses, and is it for the public good that the right to settle such demands by compromise be denied her? As was said by the supreme court of

Mr. John E. Mills

New York in the case of the Board of Supervisors of Orleans Co. v. Bowen, 4 Lansing 31: 'It would be a most extraordinary doctrine to hold that because a county had become involved in a litigation, it must necessarily go through with it to the bitter end, and has no power to extricate itself by withdrawal or by agreement with its adversary.' The same doctrine was sanctioned in the Supervisors of Chenango County v. Birdsall, 4 Wend. 453."

See also 20 C.J.S., Counties, Section 303, p. 1261:

"Where the necessary elements are present, claims against the county are subject to compromise * *.

"The settlement of a disputed claim against a county has been held to operate as a liquidation of such claim, in the manner of a judgment in case of litigation, and not to create a new obligation * * *."

That the county court is the proper body to effectuate such a compromise see Article 6, Section 7 in the Constitution of Missouri vesting the county court with the authority to manage all county business as prescribed by law and Section 50.160 RSMo. 1949, granting to the county court the power to audit, adjust and settle all claims to which the county should be a party.

The foregoing propositions would, we believe, be controlling on the questions presented and would be applied to a controversy considering therewith all of the attendant facts of the particular case, a matter which we do not undertake in this opinion.

CONCLUSION

Therefore, it is the opinion of this office that the duties conferred upon the prosecuting attorney by Section 56.070, RSMo. 1949, to investigate claims against the county carries with it the authority to recommend a compromise and settlement of such claims if the best interests of the county are served thereby.

We are further of the opinion that the county court may enter

Mr. John E. Mills

into a contract of settlement of a claim against the county which is the subject of a valid dispute.

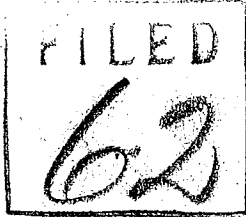
This opinion, which I hereby approve, was written by my assistant, Mr. Donal D. Guffey.

Yours very truly,

JOHN M. DALTON
Attorney General

CENTRAL COMMITTEE:
POLITICAL PARTIES:

A vacancy occurring on the county central committee of any political party shall be filled by a majority of said committee.



March 11, 1954

Honorable Forrest Mittendorf
Representative, St. Louis County
2671 Carson Road
St. Louis 21, Missouri

Dear Sir:

You have requested an official opinion:

" * * * regarding the naming of a successor to a retiring or resigning member of the Democratic or Republican Committee from the various townships in St. Louis County.

"What I would like to know is this; Does the surviving member of the committee elected by the people from a township name the successor or does the Central Body of St. Louis County have that authority? * * *"

Specific provision is provided by Section 120.787, RSMo Cumulative Supplement, 1953, (Senate Bill No. 294 of the 67th General Assembly) for filling vacancies on the county central committee of the political parties. That section reads as follows:

"Whenever any vacancy shall occur on the county central committee of any political party, a majority of the committee shall have power to fill such vacancy by electing any qualified voter of such political party who resides in the township or voting district to be represented."

Honorable Forrest Mittendorf

The language of the statute clearly indicates the intent of the legislature to have such vacancies filled by the entire county central committee of the party in question, rather than by the member of the committee remaining in the township wherein the vacancy occurs.

CONCLUSION

It is, therefore, the opinion of this office that a vacancy occurring on the county central committee of any political party shall be filled by a majority of said committee.

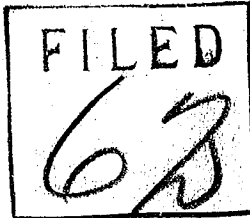
The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:vlw

SCHOOLS: Sufficiency of petitions for
SCHOOL DISTRICTS: change of boundary lines.
ELECTIONS:



May 6, 1954

Honorable Edwin W. Mills
Prosecuting Attorney
St. Clair County
Osceola, Missouri

Dear Mr. Mills:

This is in response to your request for an opinion dated March 27, 1954, which reads as follows:

"Mr. Roy Hilte, President of the Lowry City Consolidated School District (No. 4 of St. Clair County) asks if the enclosed petitions for releases of different parts of his district are in proper form and what procedure should district take at this time in regard to them.

"One is praying for an election to release certain territory to the Osceola Independent (Consolidated) School District.

"The other prays for an election to release other territory to the Iconium (Common) School District.

"These territories are not contiguous and are independent of each other.

"It appears that under Sec. 165.300 the first above mentioned must be voted on at a special election (although it provides for annexation and is silent as to a release.)

"On the other hand the release to the Iconium Common School District under Sec. 165.170 can only be voted on at an annual meeting.

"Not only that, but the ruling stated in State vs. Reorganized School District (Point III)

Honorable Edwin W. Mills

257 S.W. (2) l.c. 266, is to the effect that two different independent propositions cannot be submitted to the voters at the same election.

"I take it that the proposition to release the designated territory to the Iconium common School District can be voted on properly by the voters of both districts at the annual meetings; while the proposition to release territory to the Osceola Consolidated School District must be postponed to a special election to be called by the Lowry City Board.

"I enclose copies of the petitions and ask the opinion of your office as to what steps should be taken at this time on the petitions by the Lowry City Consolidated School District board of directors. They would much appreciate an opinion before the annual meeting of April 6th."

For sake of convenience we shall treat the two petitions separately and quote them, omitting the description of the land and signatures:

"Lowry City, Missouri, February 4, 1954.

"We the undersigned, residents of the land hereinafter described, most respectfully pray the Lowry City Consolidated School District No. 4 to release and transfer us and our property to the Iconium School District from your District.

* * * * *

"And that you take the necessary steps to make a legal transfer.

* * * * *

"To: Mr. H. L. Norfolk, Clerk
Lowry City Consolidated District IV

Honorable Edwin W. Mills

"We, the undersigned qualified voters of Lowry City Consolidated District IV, county of St. Clair, state of Missouri, desire the following changes in district boundary lines:

"The territory thus described to be released from the Lowry City Consolidated District IV and attached to the Osceola Independent School District:

* * * * *

"and hereby petition you to post a notice of such desired change in at least five public places in each district interested in or affected by such change, fifteen days prior to the time of the annual meeting.

* * * * *

The first petition for release to the Iconium School District, a common district, is governed by the provisions of Section 165.170, RSMo 1949. For the sake of brevity we will not quote that section in full. A portion thereof provides, however, that "When it is deemed necessary * * * to change the boundary lines of two or more districts," certain steps specified therein shall be taken in order to effectuate such purpose.

Although Section 165.170, supra, in and of itself is applicable only to common districts, the provisions thereof relating to changes of boundary lines are made applicable to town, city and consolidated districts by Section 165.293, RSMo 1949. The fact that changes of boundaries between a consolidated district and a common district may be effected by Section 165.170 was determined in State ex rel. Consolidated School Dist. No. 1 of Pike County v. Thurman, 274 S.W. 800. See also State ex rel. Diehlstadt Consolidated School Dist. of Scott County v. Gwaltney, 28 S.W. (2d) 678, 679.

Section 165.170, supra, is the only section under which the Lowry Consolidated District can proceed in order to release property within its boundaries to the common district because a common district does not have the power of annexation under Section 165.300, RSMo 1949.

Under Section 165.170 the same identical proposition must be voted upon at an annual election in both districts to be

Honorable Edwin W. Mills

affected by the change. In Farber Consol. School Dist. No. 1 v. Vandalia School Dist. No. 2, Mo. App., 280 S.W. 69, 72, it was said:

" * * * And from the ballots it is observable, though the point is somewhat technical, that the voters in all the districts did not vote upon the identical propositions, which must be done. School Dist. v. Neal, 74 Mo. App. 553. If it was an election for annexation, the Farber ballot should have been 'for release' or 'against release.' That is the express language of the statute."

Statutes with regard to the creation and alteration of school districts must be substantially complied with, but such statutes and the proceedings thereunder receive a reasonable and liberal construction at the hands of the court. The test for determining the sufficiency of the required petition and notice is stated in State ex rel. Rose v. Job, 205 Mo. 1, 28, 103 S.W. 493:

" * * * As was said in Mason v. Kennedy, 89 Mo. 1.c. 30, 'The important thing for the voter in each district to know, was how his district was to be affected by the creation of the new district (or by change of boundary) and what particular territory his district would lose in the creation of the new one (or by changing said boundary line). Of all this the notices and petitions fully informed the voter, and this was sufficient.'"

See also State ex inf. Mansur ex rel. Fowler v. McKown, 315 Mo. 1336, 290 S.W. 123, 126.

We believe that the petition for transfer of the described territory to the Iconium District meets this test and is sufficient.

The transfer of territory from the Lowry District to the Osceola District, both being consolidated districts, can be effected in one of two ways. It can be done under the provisions of Section 165.300, in which case it is technically an annexation by the Osceola District, or under the provisions of Section 165.170, in which case it is technically a change of boundary lines. In either case the ultimate result would be a change of boundary

Honorable Edwin W. Mills

lines by the two districts, but that there is a difference between the requirements of the petition, notice, ballot, etc., depending upon which procedure is being followed, was established in the case of Farber Consol. School Dist. No. 1 v. Vandalia School Dist. No. 2, supra.

A petition might be so worded as to meet the requirements of either Section 165.170 or 165.300 so as to authorize a proceeding under either section. Although we believe the second petition for transfer of property to the Osceola District meets the test and is sufficient for a proceeding under Section 165.170, i.e., a change of boundary lines, which must be voted upon at an annual election in both districts to be affected by the change, we do not believe it would be sufficient to authorize a proceeding under Section 165.300, i.e., an annexation proceeding, in which only the district from which the property is to be annexed votes at a special election on the proposition of release and the board of the annexing district accepts or rejects the territory.

The last portion of the petition, in which the petitioners request the clerk to post the notice of the desired change in at least five public places in each district interested in or affected by such change, which is unnecessary under Section 165.300 but essential under Section 165.170, would lead the voters to believe that the matter was going to be voted upon in each district, which is not true under an annexation proceeding. Any possibility of confusion in the petition, notice and ballot as to which method is being employed should be avoided if at all possible. See Farber Consol. School Dist. No. 1 v. Vandalia School Dist. No. 2, supra. The petition for proceeding under Section 165.300 should more nearly follow the one described in State ex inf. Taylor ex rel. Schwerdt et al. v. Reorganized School Dist. R-3, Warren County, Mo. App., 257 S.W. (2d) 262, 264.

In summary, we believe that both petitions are sufficient in form to authorize the submission of the propositions to the voters at an annual election, providing all the other provisions of Section 165.170 are followed. The first petition for release to the Iconium District cannot be used as the basis of a proceeding under Section 165.300. The second petition is insufficient to warrant a submission of the proposition at a special election, as upon an annexation proceeding, and should be amended and re-submitted as above provided.

We are enclosing copy of an opinion of this office directed to Honorable William R. Collinson dated May 4, 1942, which holds

Honorable Edwin W. Mills

that a special election may be held on the same day upon which the date of the regular election falls.

You also seem to be of the opinion that both of these propositions could not be submitted to the voters in the same election because of the language of State ex inf. Taylor ex rel. Schwerdt et al. v. Reorganized School Dist. R-3, Warren County, supra. In that connection we call your attention to the case of State ex rel. Becker v. Smith, 335 Mo. 1046, 75 S.W. (2d) 574, 575, where the court said:

"There is but one point for the determination of this court; that is, whether two separate and distinct propositions were submitted as one proposition and voted on jointly.

"The vice of 'doubleness' in submissions at elections is universally condemned. It is regarded as a species of legal fraud because it may compel the voter, in order to get what he earnestly wants, to vote for something which he does not want. State v. Maitland, 296 Mo. 338, 246 S.W. 267, 272. The rule inhibiting doubleness has been tersely stated as follows:

"'Two propositions cannot be united in the submission so as to have one expression of the vote answer both propositions, as voters may be thereby induced to vote on both propositions who would not have done so if the questions had been submitted singly.' * * *"

Therefore, it seems clear that the vice of doubleness in submissions at elections condemned by the court is not the submission of separate propositions to be voted upon singly but, rather, the submission of two separate and independent propositions as one to be voted upon jointly. If submitted separately, these two propositions could be voted upon at the same election if otherwise submissible at the same election.

CONCLUSION

It is the opinion of this office that the petition quoted herein for release of territory from the Lowry Consolidated School

Honorable Edwin W. Mills

District to the Iconium (common) School District is sufficient in form to initiate proceedings under Section 165.170, RSMo 1949, for change of boundary lines; that the petition for release of territory from the Lowry District to the Osceola Consolidated School District is sufficient in form to initiate proceedings under Section 165.170, RSMo 1949, for change of boundary lines; but that the latter is not sufficient to authorize proceedings under Section 165.300, RSMo 1949, for annexation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Enc (1): Opn. 5-4-42 to
William R. Collinson

NEGLECTED CHILD: An illegitimate child, born to a woman inmate
STATE SCHOOL: of the state school at Marshall, which inmate
was committed from Marion County, is a legal
resident of Marion County. If such child is
found to be a "neglected child", Marion County is liable for its
support, if such child has not been admitted to guardianship, and
the Division of Welfare may assist the county with child welfare
funds. The juvenile court of Marion County having acquired juris-
diction of such child may commit such child to the guardianship
of the Division of Welfare of the Department of Public Health and
Welfare for the purpose of procuring foster or boarding-home care
for such child.

May 10, 1954

FILED
62
Honorable Harry J. Mitchell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"I would appreciate your opinion in regard to the following matter:

"On the 9th day of February, 1924, one _____, a female of the age of eight (8) years was by order of the Marion County Court admitted to the Missouri State School at Marshall as a neglected and homeless child. The said _____ was paroled to Missouri State Sanitarium 5-10-41, discharged from the Sanitarium 9-29-43, and readmitted to the school by order of the Marion County Court 9-22-44; the said _____ is at the present time at the Missouri State School at Marshall, and she is now pregnant.

"It is my understanding that officials at the school claim that the father is an inmate of the State School of Marshall, at the cost of Bates County, and by order of the Bates County Court entered 12-14-35. The school officials have demanded that Marion County pay the medical expenses incident to the birth of the child, and accept responsibility for paying for the support of the child. The Court contends that it has no responsibility in this regard.

"Would you please advise us as to whether or not Marion County has any responsibility in this regard; whether or not Marion County is liable for payment of the hospital and medical bills, whether Marion County is liable for the support of the child,

Honorable Harry J. Mitchell.

whether the child will be entitled to ADC, other State aid, or other aid of any kind, what the responsibility of the State Institution, Saline County, and Bates County are in regard to support?"

We direct attention to Section 202.590 RSMo 1949, which reads:

"There is hereby established in this state a colony for feeble-minded and epileptics, to be known as 'The Missouri State School,' which shall consist of the Missouri State School at Marshall, the Missouri State School at Carrollton, the St.-Louis Training School, and such other schools in temporary or permanent camps as the division of mental diseases may establish in other places in this state."

Also to Section 202.610 RSMo 1949, which reads:

"1. There shall be received and gratuitously supported in the Missouri state schools, feeble-minded and epileptics residing in the state who, if of age, are unable, or if under age, whose parents or guardians are unable to provide for their support therein, and who shall be designated as state patients. Such additional number of feeble-minded and epileptics, whether of age or under age, as can be conveniently accommodated, shall be received into the school by the division of mental diseases on such terms as shall be just; and shall be designated as private patients.

"2. Feeble-minded and epileptics shall be received into the school only upon the written request of the persons desiring to send them, stating the age, place of nativity, if known, Christian and surname, the town, city or county in which such persons respectively reside, and the ability of the respective parents or guardians or others to provide for their support in whole or in part, and if in part only, stating what part; and stating also the degree of relationship or other circumstances of connection between the patients and the persons requesting their admission; which statement, in all

Honorable Harry J. Mitchell

cases of state patients, must be verified by the affidavit of the petitioners and of two disinterested persons, and accompanied by the opinion of two qualified physicians, all residents of the same county with the patient, and acquainted with the facts and circumstances stated, and who must be certified to be credible by the county court of that county, or, in the case of the city of St. Louis, by the hospital commissioner or the assistant hospital commissioner of said city; and such county court, or, in the case of the city of St. Louis, the comptroller of said city, must also certify, in each case, that such patient is an eligible and proper candidate for admission to the colony.

"3. State patients, whether of age or under age, may also be received into the colony upon the official application of any judge of a court of record; provided, that the county in which such state patients as are now inmates of said school, resided when they were admitted, and the county wherein such state patients herein admitted may reside at the time of such admission, shall be liable for and shall pay into the treasury of said school the sum of five dollars per month for each of such state patients."

Under the facts stated by you, we assume that this pregnant woman was committed as a state patient under paragraph 3 above, and that Marion county has paid to the state school at Marshall the sum of \$5.00 per month for her care during the time of her commitment there. We do not believe that Marion County can be required to make other payments, and we therefore believe that Marion county cannot be held liable for the expenses incident to the birth of this child.

The next question is whether Marion county can be held liable for the support of this child? The only theory upon which Marion county could be held liable would be that this child, at birth, will be a homeless, neglected and dependent child, and a legal resident of Marion county. We will consider this matter of residence first. We will begin by observing that it is our belief that the mother of this child is, and at all times since her commitment to the state school in 1924 has been, as she was prior to 1924, a legal resident of Marion county.

In the case of Barth v. Barth, 189 S.W.(2d) 451, at l.c. 454, the court stated:

Honorable Harry J. Mitchell

"To create a residence in a particular place two fundamental elements are essential. These are actual bodily presence in the place, combined with a freely exercised intention of remaining there permanently, or for an indefinite time. Whenever these two elements combine a residence is created. Neither bodily presence alone nor intention alone will suffice to create a residence. Both must concur, and at the very moment they do concur a residence is created. The length of the period of bodily presence, however short, is of no consequence, provided the concurring intention is established by other evidence. Otherwise it may become an important fact for consideration in determining the existence or not of the intention.* * *"

In the instant case, these two elements necessary to create residence in Saline county, where the state school is located, are not present. One of these elements, a long period of bodily presence in Saline county, is present, but it cannot be inferred that there is present an intention on the part of this woman to become a resident of Saline county. At the age of eight years she was forceably removed from Marion county to Saline county, and has been forceably kept there since. Furthermore, it is to be doubted that she has sufficient intellect to form an intention as to residence. We think this conclusion is supported by paragraph 1 of Section 202.630, RSMo 1949, which reads:

"1. The superintendent of the school, with the approval of the division of mental diseases, shall have the power to refuse to discharge any patient who, in his judgment, has not sufficiently recovered to warrant their discharge and shall have the power to discharge any patient who, in his judgment, has fully recovered, and if a state patient, said patient shall be returned to the county from whence admitted, the expense thereof to be paid by said county."

It will be noted that upon recovery a state patient shall be returned to the county from which admitted, at the expense of that county, which would certainly indicate that the county from which the patient was admitted continued to be the county of the legal residence of the patient. The \$5.00 per month payment by the county from which the patient is admitted, in the case of a state patient, would indicate the same thing, and constitutes an admission on the part of the sending county of a continuing obligation which could only be present in the case of a legal resident of the sending county.

Honorable Harry J. Mitchell

We conclude, therefore, that this expectant mother is a legal resident of Marion county. Her child will be born in Saline county. What, then, will be the legal residence of the child? We believe that the legal residence of the child will be Marion county, on the theory that the legal residence of a new born child is the same as that of the mother, in a case, such as this, of an illegitimate child, whose father is not definitely known. In this regard we direct attention to the case of *Smith v. Young*, 136 Mo. App. 65. At l.c. 73 et seq. of its opinion, the court stated:

"The jurisdiction of the probate court to appoint a guardian or curator for a minor is fixed by the domicile of the minor. (*Lacey v. Williams*, 27 Mo. 280; *DeJarnet v. Harper*, 45 Mo. App. 415.) And as a general proposition, the domicile of the parent is the domicile of the minor. (*Marheineke v. Grot-haus*, 72 Mo. 204; *Garrison v. Lyle*, 38 Mo. App. 558.) The domicile of the minor is a matter in pais which the probate court must find as a fact to support its jurisdiction in proceedings of this character. (*Cox v. Boyce*, 152 Mo. 576; *Johnson v. Beasley*, 65 Mo. 250.) It seems, however, that the domicile of the parent may not necessarily always be the domicile of the minor for the purpose of determining the jurisdiction of the probate court, as in cases where both parents are dead and the child is domiciled with the grand parents, who are next of kin, and stand in loco parentis to the minor. Or where the parents have wholly abandoned the child to the grandparents. In the case of *Cox v. Boyce*, 152 Mo. 576, it appears the mother of the minor was dead and the father had surrendered and committed the child to its grandfather in Lincoln county. In that case, both father and grandfather resided in the same county. After the child was committed to his care, the grandfather was duly appointed curator of its estate by the probate court of Lincoln county. The grandfather afterwards removed to Howell county. He was never discharged as guardian and curator by the probate court of Lincoln county. After having resided several years in Howell county, the grandfather applied to and was appointed by the probate court of Howell county as guardian of the child and curator of the estate, although the child's father continued to reside in Lincoln county. In a collateral attack upon the judgment of the Howell county probate court, by which the grandfather was appointed curator, the Supreme Court expressed the opinion that in view of the fact that the child's father had surrendered the minor to her grandfather, the latter stood in loco parentis toward her and therefore his residence in Howell county was the domicile of the child, and thus served to confer jurisdiction upon the probate court of that county to appoint a curator.

Honorable Harry J. Mitchell

We conclude, therefore, that this child, when born, will be a legal resident of Marion county. We also believe that such child will be a "neglected child", within the meaning of paragraphs 1 and 2 of Section 211.310 RSMo 1949, which reads:

"1. Sections 211.310 to 211.510 shall apply to children under the age of seventeen years, in counties of the third and fourth classes, who are not now or hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children. When jurisdiction has been acquired under the provisions hereof over the person of a child, such jurisdiction shall continue, for the purpose of sections 211.310 to 211.510, until the child shall have attained the age of twenty-one years.

"2. For the purpose of sections 211.310 to 211.510, the words 'neglected child' shall mean any child under the age of seventeen years, who is homeless or abandoned, or who habitually begs or receives alms, is found living in any house of ill fame; or with any vicious or disreputable person, or who is suffering from depravity of its parents, or other person in whose care it may be."

This child will not be an "inmate of any state institution", within the meaning of paragraph 1 of Section 211.310, supra, not having been committed there by due process of law. This being so, there is no obligation on the part of the state school to support or keep the child; its mother is without a home and is mentally incompetent, as is the supposed father. We believe, therefore, that the child will be "homeless" within the meaning of paragraph 2 of Section 211.310, supra.

All of the above leads us to the conclusion that this child, when born, will be a legal resident of Marion county, and will be a "neglected child" as that word is used in the Missouri statutes. In that situation we believe that the position of Marion county is set forth in an opinion (a copy of which is enclosed) rendered by this department March 21, 1951, to Honorable Elton A. Skinner, Prosecuting Attorney of Howard county. That opinion holds that "the county in which a neglected child is so declared by the court, is liable for support if the child has not been committed to guardianship. The division of welfare may assist the county with child welfare funds."

We would also direct attention to Section 210.120 RSMo 1949, which reads:

Honorable Harry J. Mitchell

"The juvenile court of the county of a homeless, dependent, neglected or ill-treated child's residence may commit such child to the guardianship of the division of welfare of the department of public health and welfare for the purpose of procuring foster or boarding home care for said child.

"Any citizen may make a verified complaint in writing to the juvenile court stating that in his opinion such a child is dependent upon the public for support, or in a state of habitual vagrancy or mendicancy or is ill-treated, and that his or her life, health or morals are endangered by continued cruel treatment, neglect, immorality, or gross misconduct of its parents, guardians or custodians; also giving sufficient information to locate and identify such child and praying for appropriate action by the court in conformity with the provisions of sections 210.110 to 210.190.

"Upon the filing of such petition the judge shall have summons issued requiring the child and the parent or parents, guardian or other persons having control of the child, to appear in court at a time and place named to show cause why such child should not be dealt with according to the provisions of sections 210.110 to 210.190.

"If the child has no parent, guardian or custodian within the county or if after reasonable effort personal service shall not have been made such substitute service, by publication or otherwise, as the judge may order shall be sufficient. Any person may appear upon behalf of the child and upon order of the judge the person or persons filing the complaint shall appear. Upon like order the county or prosecuting attorney shall appear in support of the complaint."

CONCLUSION

It is the opinion of this department that an illegitimate child, born to a woman inmate of the state school at Marshall, which inmate was committed from Marion county, is a legal resident of Marion county.

Honorable Harry J. Mitchell

It is our further opinion, if such child is found to be a "neglected child", that Marion county is liable for its support, if such child has not been admitted to guardianship, and that the division of welfare may assist the county with child welfare funds.

It is our further opinion that the juvenile court of Marion county, having acquired jurisdiction of such child, may commit such child to the guardianship of the division of welfare of the department of public health and welfare, for the purpose of procuring foster or boarding-home care for such child.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

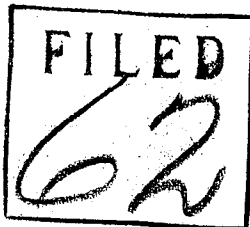
enc. Opn. Elton A. Skinner, 3-21-51

SANITY PROCEEDINGS:

PROSECUTING ATTORNEY: It is not the duty of prosecuting attorney to prepare legal papers for sanity hearings for indigent insane person.

JUDGE AND CLERK OF
PROBATE COURT:

Neither the probate judge or clerk should prepare legal papers in sanity hearings.



August 11, 1954

Honorable Harold L. Miller
Prosecuting Attorney
DeKalb County
Maysville, Missouri

Dear Sir:

This is in reply to your recent request for an opinion of this office, which request is as follows:

"Will you kindly advise me in an opinion whether or not it is the duty of the Prosecuting Attorney to prepare legal papers leading to the adjudication of an indigent insane person, and if not whether or not this is the duty of the Judge and Clerk of the Probate Court."

The preparation of "papers leading to the adjudication of an indigent insane person" is unquestionably a representation of the informant or the alleged insane person.

We are enclosing herewith a copy of an opinion rendered by this office to Honorable Roy W. McGhee, Jr., Prosecuting Attorney of Wayne County, on January 7, 1952. This opinion holds it is improper for a prosecuting attorney in his county to represent the informant or the alleged insane person at a sanity hearing. Such representation is improper because it is his duty to represent the county in all sanity hearings in his county.

Your further inquiry is whether or not it is the duty of the judge or clerk of the probate court to prepare legal papers necessary for a sanity hearing before the probate court. Our answer to this query is "No." The answer is so apparent we do not deem it

Honorable Harold L. Miller

necessary to cite authorities holding that a court or its clerk should not prepare such legal papers, the sufficiency or legality of which the court may necessarily have to pass upon.

CONCLUSION

It is the opinion of this office that it is not the duty of the prosecuting attorney to prepare legal papers leading to the adjudication of an indigent insane person.

Neither the probate judge or the clerk of the probate court should prepare legal papers necessary for a sanity hearing.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Grover C. Huston.

Very truly yours,

JOHN M. DALTON
Attorney General

GCH:sm

Enc. (1): Opinion to
Hon. Roy W. McGhee, Jr.
Jan. 7, 1952

HEDGE FENCES: The term "hedge fence" as used in Sec. 229.110 means a fence composed of Osage Orange, and need not be one which is actually and presently used for fence purposes, but must be one intended or capable of being used for said purposes as distinguished from a voluntary, intermittent or irregular growth.



November 1, 1954

Honorable Joe H. Miller
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office, which request reads as follows:

"It is my desire to have your interpretation of Section 229.110 Revised Statutes of Missouri, 1949. This statute in substance provides that the owner of hedge fences situate along, on, or near the right of way of any public road must keep them cut to a certain height.

"1. What constitutes a hedge fence under this section; i.e. must the fence be one used for fence purposes, and must it be one made up of Osage Orange, or would it apply to any kind of brush or shrubbery which is used wholly or partially for fence purposes?

"2. If the road overseer, or the proper authority should cut the hedge fence, or brush and if so, is the cutting limited to the hedge or brush growing on the right of way or can the cutting be done as far back as is necessary to protect the roadway?"

You first inquire whether Section 229.110 relates only to a fence made up of Osage Orange as distinguished from brush or other shrubbery, and whether the hedge must be one used for fence purposes. Section 229.110 provides in part as follows:

"1. Every person owning a hedge fence situated along or near the right of way of any public road shall between the first days of

Honorable Joe H. Miller

May and August of each year cut the same down to a height of not more than five feet, and any owner of such fence failing to comply with this section shall forfeit and pay to the capital school fund of the county wherein such fence is situated not less than fifty nor more than five hundred dollars, to be recovered in a civil action in the name of the county upon the relation of the prosecuting attorney, and any judgment of forfeiture obtained shall be a lien upon the real estate of the owner of such fence upon which same is situated, and a special execution shall issue against said real estate and no exemption shall be allowed."

The term "hedge" is defined in Websters International Dictionary, Second Edition, as follows:

- "1. A thicket of bushes, often thorn bushes, esp. when planted as a fence or boundary.* * *
4. The Osage Orange."

The same works, referring to "Osage Orange," notes the following:

"Now commonly planted for hedges."

While we are unable to find any reported case defining the term "hedge fence" as used, we direct your attention to the case of Moore v. Hawk, 57 Mo. App. 495, l.c. 498, wherein the court makes use of the term "Osage hedge." From the foregoing definitions and from our understanding of the general concepts of the term "hedge" when used in reference to a stock tight enclosure, we are of the opinion that the term "hedge fence" as used in the above section refers to an enclosure made up of Osage Orange.

We are further of the opinion that the hedge fence referred to in Section 229.110 need not be actually and presently used for fence purposes, but that it falls within the purview of said section if it was intended for fence purposes or is capable of being used for fence purposes if properly attended, as distinguished from intermittent, irregular or voluntary growth.

You next inquire whether this section pertains only to hedge fence situated on or along the right of way, or whether it would

Honorable Joe H. Miller

encompass the cutting of hedge fence some distance from the right of way. In this regard, I am enclosing a copy of an opinion written to Ralph H. Duggins, Prosecuting Attorney of Saline County, under date of October 16, 1949, holding that the words "or near" as used in the phrase "along or near the right of way" should be treated as having the same meaning as "at or along," which opinion, I believe, fully answers the latter question.

CONCLUSION

Therefore, it is the opinion of this office that the term "hedge fence" as used in Section 229.110 means a fence composed of Osage Orange. We are further of the opinion that the term "hedge fence," as used in the said section, need not be one which is actually and presently used for fence purposes, but must be one intended or capable of being used for said purposes as distinguished from a voluntary, intermittent, or irregular growth.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

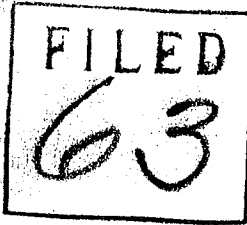
Yours very truly,

John M. Dalton
Attorney General

DDG/vtl

Enclosure: 10-16-49 to Ralph H. Duggins

TOWNSHIPS: Township has no authority to use township machinery to do work for private individuals for hire.



February 16, 1954

Honorable Garner L. Moody
Prosecuting Attorney
Wright County
Hartville, Missouri

Dear Mr. Moody:

This is in response to your request for opinion dated January 30, 1954, which reads, in part, as follows:

"Is it lawful for a Township, in a county under township organization, to use township machinery to do work for private individuals for hire?"

At the outset, in the determination of this question we are confronted with the provisions of Section 65.270, RSMo 1949, which reads as follows:

"No township shall possess any corporate powers, except such as are enumerated or granted by this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or granted."

It is significant to note that absent such a statutory provision this same principle of law has been applied to other public corporations, such as counties and municipalities. The following excerpt from the case of Lancaster v. County of Atchison, 180 S.W. (2d) 706, l.c. 708, is particularly worthy of note:

"Both parties to this suit agree that counties, like other public corporations, can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly

Honorable Garner L. Moody

implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation - not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.' Dillon on Municipal Corporations, 3rd Ed., Section 89. We have repeatedly approved this quotation. See State ex rel. City of Blue Springs v. McWilliams et al., 335 Mo. 816, 74 S.W. (2d) 363; State ex rel. City of Hannibal v. Smith, State Auditor, 335 Mo. 825, 74 S.W. (2d) 367, 372."

See also Snip v. City of Lamar, 201 S.W. (2d) 790, l.c. 796, and Taylor et al. v. Dimmitt, Mayor, et al., 78 S.W. (2d) 841, l.c. 843.

More specifically, it has been held that the same principle that applies to counties with regard to powers which may be exercised is also applicable to townships. For instance, in Jensen v. Wilson Tp., Gentry County, 145 S.W. (2d) 372, l.c. 374, it was said:

" * * * A township board functions not as a court of broad jurisdiction but as the agent of the township with limited authority. Consequently, it is even more essential that its authority be exercised in strict compliance with the powers granted to it. Such a board comes under the same rule as a county court. A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it must pursue its authority and act within the scope of its powers. State ex rel. Quincy, etc., Ry. Co. v. Harris, 96 Mo. 29, 8 S.W. 794. * * *"

Bearing in mind this principle and the similarity between the rule as applied to counties and municipalities and Section 65.270, supra, we now proceed to examine some of the cases construing the corporate powers of municipalities and counties.

Honorable Garner L. Moody

In Kennedy v. City of Nevada, 281 S.W. 56, the city had purchased land for the purpose of maintaining, and so maintained, a tourist camp for the benefit of transients. It was held in that case that the city had exceeded its authority, and the court made this statement, i.e. 60:

"Of course, a municipality has no implied power to engage in a private business.
19 R.C.L. p. 788, Sec. 95. * * *"

The case of Heimerl et al. v. Ozaukee County et al., 256 Wisc. 151, 40 N.W. (2d) 564, was an action brought to determine the constitutionality of a Wisconsin statute which purported to authorize cities, towns and villages to enter into contracts to build, grade, drain, surface and gravel private roads and driveways. It further provided that any county could enter into agreements with a municipality to perform for it any such work. The court, in holding this statute unconstitutional, distinguished between this type of activity and other projects in which counties and municipalities might engage by virtue of other statutes, such as removing snow from private driveways, the manufacture, sale and distribution of agricultural lime, the soil conservation statute, etc., on the ground that the latter are natural governmental functions and are necessary to the health, safety and welfare of the community as a whole, whereas under the statute in question the public received no benefit either directly or indirectly. Only the private landowner benefited, and it was not therefore a proper governmental function. The court quoted from State ex rel. Wisconsin Dev. Authority v. Dammann, 228 Wisc. 147, 180, 277 N.W. 278, 280 N.W. 698, 708, as follows:

"The course or usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, and the objects and purposes which have been considered necessary for the support and proper use of the government are all material considerations as well as the rule that to sustain a public purpose the advantage to the public must be direct and not merely indirect or remote."

Taylor v. Dimmitt, supra, was an injunction proceeding brought to enjoin the erection or operation of a proposed electric transmission line by which the City of Shelbina proposed to furnish electricity, of which it had a surplus, to an unincorporated village located outside the City of Shelbina. It was not contended that the city had no authority to sell or supply

Honorable Garner L. Moody

a utility service to nonresidents but merely that the statute did not give the city authority to construct, maintain and operate an electric transmission line for this purpose. The court considered the statutes authorizing a municipal corporation to acquire, maintain and operate power plants, etc., and to supply nonresidents but concluded that the statute did not authorize the construction, maintenance and operation of an electric transmission line for the purpose of furnishing service to consumers outside its corporate boundaries. Although a constitutional issue was raised, the court concluded by saying that, since the statutes were not broad enough to authorize the construction, maintenance and operation of the proposed electric transmission line, it was unnecessary to discuss the constitutional issues presented.

In the question before us submitted by your request, we are not put to the task that the Wisconsin Supreme Court was in the Heimerl case, supra, in that we are not faced with a statute specifically purporting to authorize the practice about which you inquire so as to give rise to the presumption of constitutionality. On the contrary, in order to uphold this practice not only must we find that this will inure to the benefit of the public generally so as to make it a proper governmental function but we must first find statutory authorization therefor.

Considering all the powers granted to townships in Sections 65.010 through 65.610 and Sections 231.150 through 231.330, RSMo 1949, we are unable to find any power from which it could reasonably be implied that townships have the authority to use township machinery to do work for private individuals for hire. Such a practice, although perhaps in some cases convenient, is certainly not essential to the declared objects and purposes of the township government and is not necessary to the exercise of powers expressly enumerated or granted. Paraphrasing the quoted portion of the Kennedy case, supra, it can with pertinence by analogical reasoning be said that a township has no implied power to engage in a private business. We therefore conclude that the power to use township machinery to do work for private individuals for hire has not been granted by the Legislature.

The holding herein is consonant with the opinion of this office to Honorable W. Oliver Rasch dated June 3, 1943, in which it was held that a county court has no authority to rent road machinery to an individual, etc., and with the opinion of this office to Honorable James E. Curry dated February 13, 1951, in

Honorable Garner L. Moody

which it was held that a county court has no authority to lease part of the courthouse to a private individual, copies of which we are enclosing.

CONCLUSION

It is the opinion of this office that a township has no authority to use township machinery to do work for private individuals for hire.

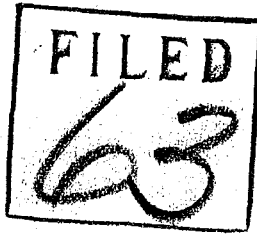
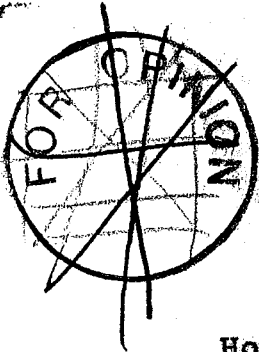
The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Very truly yours,

JOHN M. DALTON
Attorney General

JWI:ml
Encs (2)

SPECIAL ROAD DISTRICTS: A special road district may employ a private attorney and reimburse him out of its fund to represent the special road district in action brought to dissolve the district.



April 1, 1954

Honorable J. Hal Moore
Prosecuting Attorney
Lawrence County
Courthouse
Mt. Vernon, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I would like to have the opinion of your department on the following proposition. Does a Special Road District after a petition has been filed in the County Court to change the Special Road District to a Common, have the authority to hire an attorney to defend the Special Road District against said proceedings, and to pay the attorney out of the Special Road District's funds?

"I would appreciate getting an opinion, on this at the earliest possible time, as the County Court has granted the petitioners relief and has changed the road district from Special to Common and the trustees have been appointed to audit the books of the Special Road District and file their report with the County Court, and it is necessary for them to know whether the road district went beyond its discretion in hiring an attorney."

In your above letter you state that "a petition has been filed in the county court to change the Special Road District to a Common (road district)"

We would here observe that there is no provision whatever in Missouri law for the changing of a special road district to a common road district. There are provisions made for the dissolution of each of the three kinds of special road districts which can be established in this state. Apparently what occurred was that after the dissolution of the special road district in the instant case the county court made an

Honorable J. Hal Moore

order dividing the land formerly in such special road district into common road districts. Since Lawrence is not a township organization county, and since, as you inform us, a petition was filed with the county court and the county court dissolved the special road district, we assume that the district to which you refer was a benefit assessment district organized under Section 233.170 RSMo. 1949, et seq.

Such being the case, its dissolution could be effected under Section 233.290, RSMo. 1949, which reads:

"Whenever any owner of land within any road district organized under the provisions of sections 233.170 to 233.315 shall file with the county court of the county in which such district may be located a petition verified by an affidavit stating that such road district has no commissioners and has failed to elect commissioners at any regular election of the district, or has failed to hold a special election to fill any vacancy in the office of commissioner, or that such road district has ceased to perform the functions for which it was created, the county court shall cause five notices to be posted in conspicuous places in said district, giving notice of the filing of such petitions, and that unless cause be shown to the said court on a day to be named in said notices, not less than thirty nor more than sixty days from the time of posting such notices, why the said road district should not be dissolved, that the same will be dissolved; and if on the day named in such notices no party in interest shall appear and show that the said road district is performing the functions for which it was created or that it has commissioners or that good cause exists why the said road districts should not be dissolved, the county court shall, on the next court day make its order of record that such road district be dissolved; provided, that if any party in interest shall appear and show cause as herein provided, the county court shall proceed to hear evidence on the matter, and if it appear to the satisfaction of the court that no

Honorable J. Hal Moore

good cause exists why such road district should not be dissolved, it shall enter its order of record that such road district be dissolved, and if contrary appear, the said petition shall be dismissed; provided further, that nothing in sections 233.170 to 233.315 shall affect the validity of any bonds that may have been issued by such road district or affect the levy or collection of any special taxes that may have levied or assessed against any lands within such district; provided further, after the dissolution of any such special road district the land therein shall be divided into road districts under the provisions of sections 231.010 to 231.030, 231.050 to 231.100 and 137.555 to 137.575, RSMo 1949, and any money that may be on hand to the credit of such special road district that shall not be needed to satisfy any liabilities of such special road district, shall, by order of the county court, be turned over to such new road districts in proportion to the number of acres allotted to each such new district."

Dissolution could also be had under Section 233.295 RSMo 1949 which reads:

"Whenever a petition, signed by the owners of a majority of the acres of land, within a road district organized under the provisions of sections 233.170 to 233.315 shall be filed with the county court of any county in which said district is situated, setting forth the name of the district and the number of acres owned by each signer of such petition and the whole number of acres in said district, the said county court shall have power, if in its opinion the public good will be thereby advanced to disincorporate such road district. No such road district shall be disincorporated until notice be published in some newspaper published in the county where the same is situated for four weeks successively prior to the hearing of said petition."

Honorable J. Hal Moore

In either instance the decision as to whether or not the district is to be dissolved is a matter of discretion with the County Court.

Let us now turn our attention to Section 233.170, RSMo. 1949, under which section, and following sections, we have assumed that the special road district in the instant case was formed. That section reads:

"1. County courts of counties not under township organization may divide the territory of their respective counties into road districts, and every such district organized according to the provisions of sections 233.170 to 233.315 shall be a body corporate and possess the usual powers of a public corporation for public purposes, and shall be known and styled '_____ road district of _____ county,' and in that name shall be capable of suing and being sued, of holding such real estate and personal property as may at any time be either donated to or purchased by it in accordance with the provisions of sections 233.170 to 233.315, or of which it may be rightfully possessed at the time of the passage of sections 233.170 to 233.315, and of contracting and being contracted with as herein provided."

It will be noted that the special road district thus created may sue and may be sued. The conferring of this capacity to sue and to be sued obviously contemplates that in the event of suing or of being sued, the special road district will be represented by an attorney. In the South Carolina case of Paslay v. Brooks, 17 S.E. 2d 865, at l.c. 868 of its opinion, the court stated:

"The capacity to sue and be sued carries with it all powers that are ordinarily incident to the prosecution or defense of an action at law or a suit in equity, including the power to employ counsel."

Since this is true, and since judicial notice may be taken of the fact that attorneys make monetary charges for their services, we may further deduce that under circumstances when a special road district may properly institute

Honorable J. Hal Moore

a suit or when a special road district is sued that the special road district may hire an attorney and pay him out of district funds, unless it is the duty of the prosecuting attorney of the county to represent the special road district in such matters. The duties of a prosecuting attorney are set out in Section 56.060, RSMo. 1949, which reads in part:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county"

And in Section 56.070, RSMo. 1949, which reads in part:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor.* * *"

Our specific question is whether it can be said that the state or a county or both is concerned or interested, within the meaning of the above statutes, in a proceeding where it is sought to change a special road district to a common road district?

In this regard we direct attention to the case of State ex rel Wammack and Welborn v. Affolder, 257 S.W. 493. The facts in that case were that Stoddard was a township organization county; that Duck Creek township in Stoddard County desired to vote township road bonds; that the county court of Stoddard County employed plaintiffs to look after the legal phases of this bond issue, and that plaintiffs did so in an admittedly satisfactory manner. The county court then issued a warrant on the treasurer of Duck Creek Township to pay plaintiffs \$160.00, which the treasurer declined to do. In subsequent actions the case came to the Springfield Court of Appeals, which rendered an opinion holding that the plaintiffs should be paid. In the course of its opinion the court stated (l.c. 494 and 495):

Honorable J. Hal Moore

"Was it the duty of the prosecuting attorney to render the services which plaintiffs rendered? Sections 736 and 738 prescribe generally the duties of the prosecuting attorney. There is nothing in these sections which may be said to place upon the prosecuting attorney the duty of looking after this bond issue. There are other sections prescribing duties in particular cases, but the sections, supra, cover the field generally. The bond issue of Duck Creek township was not a matter of county wide concern. It was a matter that affected that township only. The Act of 1917 provided that in a township bond issue thereunder the county court shall act for the township. The only recognition of township organization is that the act provides in section 10750 that the proceeds of the bond sale be turned over 'to the treasurer of the district or the county or township, as the case may be.' In the reference quoted, and in section 10748, it will be seen that, not only was the township organization taken into account, but also special road districts organized under sections 10800 et seq. and sections 10833 et seq., R.S. 1919. Neither the act of 19017, nor the Special Road District Acts, makes it the duty of the prosecuting attorney to advise or render service. There is nothing in the Township Organization Act (section 13164 et seq., R.S. 1919) which makes it the duty of the prosecuting attorney to render the service rendered here by plaintiffs. * * * It stands conceded that it was necessary that some attorney render the services which plaintiffs rendered. The conclusion, therefore, is that the county court had the power, acting for the township, to employ plaintiffs. Since there is no statute directing generally that the prosecuting attorney shall act for the township in

Honorable J. Hal Moore

counties under township organization, it is our conclusion that it was not the official duty of the prosecuting attorney to render the services which plaintiffs rendered."

While we are aware that the above opinion deals with a township organization county, yet we note that it also lays down the general law, applicable to counties not under township organization, that 'neither the act of 1917, nor the Special Road District Acts, make it the duty of the prosecuting attorney to advise or render service.'

Since, therefore, it is not the duty of the prosecuting attorney to represent a special road district, and since it is conceded that, since a special road district has the power to sue and may be sued, it necessarily must at such times be represented by an attorney, it follows that the governing body of a special road district may hire a private attorney and may reimburse him out of district funds. Such we believe to be the law declared by the Affolder case, and we are unable to find any subsequent cases or statutes which are in conflict.

There remains only the question of whether the governing body of the special road district may employ an attorney and defend against such action as was taken in the instant case, which was to dissolve the district.

We do not feel that any restriction exists in the law or the cases regarding the power of a special road district to sue or to defend against a suit. In the absence of such restriction, it would appear that the taking of legal action or defending an action brought was a matter within the discretion of the governing body of the special road district. We further observe that a special road district is a body corporate and that the governing body of a corporation is largely unrestricted in the taking of legal action.

Furthermore, in an action brought to dissolve, a special road district is clearly an "interested party," and has an inherent right to protest against an action which would put a period to its existence. Under each section by which dissolution could be effected in this case (233.290 and 233.295, supra) it is provided that notice of dissolution proceeding must be given. Certainly landowners in the district have

Honorable J. Hal Moore

the right to be heard in the proceedings before the County Court, and naturally the movants in the proceeding to dissolve will be heard. It would seem that the District has an equal right to protest against dissolution, in which case it would seem that the District had the right to be represented by counsel. In an opinion rendered by this Department on August 4, 1953, to Honorable Andrew J. Higgins, Prosecuting Attorney of Platte County, this Department held that an appeal from the decision of a County Court dissolving a special road district would lie. This would appear also to entail the services of an attorney. The opinion recognizes the fact that a proceeding for dissolution is adverse to the district. A copy of this aforesaid opinion is enclosed.

CONCLUSION

It is the opinion of this Department that a special road district may employ a private attorney and reimburse him out of its fund to represent the special road district in action brought to dissolve the district.

The foregoing opinion which I hereby approve, is prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:lvd

Enclosure

COUNTY COURTS: A county court may agree at a stated consideration
BONDS: the cancellation of outstanding bonds prior to maturity date, where such agreement will result in substantial savings to the county in the nature of a waiver of future interest payments.



April 30, 1954

Honorable Weldon W. Moore
Prosecuting Attorney
Houston, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office which request reads as follows:

"In 1940 Texas County, a County of the third class voted a \$50,000.00 funding bond to pay County Revenue Warrants. The bonds were for 20 years with interest at the rate of $3\frac{1}{2}\%$. There is a balance of \$21,000.00 owing on these bonds and the County is in position to pay this amount and the County Court desires to pay the balance. It is believed the bond purchasers will accept payment if the county will pay interest for the year of 1954, which is not yet due.

"The County Court desires to know whether or not they may pay the interest for 1954 when it is not owed and the interest payment is met solely for the purpose of inducing the bond holders to accept payment for the bonds.

"If this action is permissible the County can save approximately \$5,000.00 on interest payments."

A bond is essentially a contract between two persons (here the county and the bondholders) for the payment of money in a specified time and usually at a stated rate of interest. While bonds such as here considered could have contained a provision for recall at the option of the county prior to maturity we assume that said bonds did not so provide. Such being the case the bondholders could under contract insist upon the payment of principal and interest as per the terms of the contract and the county would be obligated to comply. However, as stated since the bond is a matter of contract the parties may agree to a different method of discharging the

Hon. Weldon W. Moore

obligation or cancellation thereof. While you have indicated that the bondholders would agree to a cancellation of the bonds upon payment of the principal remaining and interest for the year 1954, we do not believe that such would be the legal effect. There would be no authority for the payment of interest which has not yet accrued. The payment to the bondholders of an amount equal to the amount of interest which would ultimately become due for the year 1954 should, we believe, be treated as the consideration for an agreement to cancel the bonds upon payment of the principal remaining.

It is our opinion that the county court may enter into such a contract for the discharge of such obligation. Section 49.270, RSMo. 1949, among other things, vests the county court with the control and management of property belonging to the county and the authority to audit and settle all demands against the county.

The county court has the authority to issue bonds (Chapter 108, RSMo. 1949) and to enter into contract on behalf of the county. *Aslin vs. Stoddard County*, 106 S.W. 2d. 472.

County courts are the fiscal agents of the county (State ex rel. *Walther vs. Johnson*, 173 S.W. 2d. 411) and have such implied powers as are necessary to carry out powers expressly granted. (*King v. Maries County*, 249 S.W. 418.) With these authorities in mind it is our opinion that the county court may agree at a stated consideration for the cancellation of outstanding bonds prior to maturity date where there are sufficient funds available for such purpose and where such action would result in a substantial saving to the county by waiver of further interest payments. Such action is in complete accord with good business practices and is to be recommended.

CONCLUSION

Therefore, it is the opinion of this office that a county court may agree at a stated consideration for the cancellation of outstanding bonds prior to maturity date, where such agreement will result in substantial savings to the county in the nature of a waiver of future interest payments.

This opinion, which I hereby approve, was written by my assistant, Mr. Donal D. Guffey.

Yours very truly,

DDG:mw

JOHN M. DALTON
Attorney General

ALTERATION OF
TOWNSHIP LINES:



The county court of a county operating under township organization has the power to change a township boundary line upon the receipt of a petition signed by not less than one-fourth of the voters of the township or townships affected, which petition is followed by a vote in the township or townships affected, and which proposition for change is ratified by a majority of not less than two-thirds of the votes cast.

June 17, 1954

Honorable Elvis A. Mooney
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"The voters of Stoddard County elected to organize Stoddard County under township organization, as provided in the Constitution for alternate forms of local government; this election occurred many years ago and is the present form of organization in this county.

"Recently the county voted on a plan of school reorganization as determined by the County Board of Education and approved by the Board of Education. One of the local school districts added to the Dexter district is partially located in Castor Township whereas Dexter (the district to which this local district was annexed) is located in Liberty Township; various citizens in this local district who are residing in that portion of the common school district which is situate in Castor Township desired to obtain a change in the location of the township line between Castor Township and Liberty Township so that the section where they live will become a part of Liberty Township; these citizens verbally presented their request to the County Court, whereupon the County Court has requested my office for clarification of the law so that the County Court will know the various pre-requisites, in the law, to effectuate this change in the township lines. I am not informed regarding the position of the County Court as to whether they desire or do not desire to effectuate this change.

"Section 65.530 V.A.M.S., which is a part of the chapter dealing with township organization counties, required a petition of one-fourth of the voters of the township whereupon the court shall submit the

Honorable Elvis A. Mooney

proposed change to the qualified voters at the next regular township election after proper notice; in such election a two-thirds majority of the votes cast in said election is required to effectuate the change whereas in Section 47.010 V.A.M.S. it appears that the County Court may divide the county into convenient townships and as occasion may require erect new townships and sub-divide townships already established; this section states that the county court may organize better township lines; these things apparently may be done without a petition from the voters and further without the necessity of obtaining the consent of the voters affected thereby.

"Will you please furnish this office with your opinion as to the applicable law together with the necessary steps required for the changing of the boundary line between Castor Township and Liberty Township in Stoddard County, a county operating under the township organization law?"

In the above you referred to Section 47.010 RSMo 1949. Chapter 47, of which this section is a part, is entitled "townships, removal of county seats and division of counties." From its title and context, it is clear that this chapter applies to counties generally. Section 47.010, supra, reads as follows:

"Each county court may divide the county into convenient townships, and as occasion may require erect new townships, subdivide townships already established, organize better township lines, and may, upon the petition in writing, of not less than twenty-five per cent of the legally qualified voters of each township affected, as such vote was cast in the last preceding general election for the office receiving the greatest number of votes in the township or townships affected, consolidate two or more existing townships into one township, or otherwise reduce the number of townships, or change the boundary lines thereof, as may be deemed advisable."

In an opinion rendered April 17, 1942, to Honorable Herbert A. Douglas, Prosecuting Attorney of Newton County, this department held that Section 47.010, supra, meant that the changing of a township boundary line or an increase in the number of townships, could be effected by an order of the county court alone, but that a reduction in the number of townships had to be by petition and vote, as set forth in the latter part of the above section.

Honorable Elvis A. Mooney

Therefore, we conclude that if Section 47.010, supra, were applicable to your situation, the change in the township boundary line could be effected by order of the county court alone. However, in this connection, we must consider the second section noted by you, to-wit, Section 65.530 RSMo 1949. Chapter 65, of which the above section is a part, is entitled "township organization counties" and deals with the law applicable to such counties. Section 65.530, supra, reads as follows:

"The county court of each county shall have power to alter the boundary of townships and to increase or diminish their number, as follows, viz.: Upon the petition of one-fourth of the voters of the township or townships proposed to be altered, the county court shall submit the proposed alteration to the qualified voters thereof, at any regular township election, by giving at least thirty days' notice thereof to such township or townships, in the usual manner of giving election notices; and if such alteration shall be ratified by a majority of two-thirds of the votes cast by the voters affected thereby, then such alteration shall be confirmed by the county court, and each township shall be named in accordance with the expressed wishes of its inhabitants."

The above section is not, to us, altogether plain. It is however, clarified by the following Section 65.540 RSMo 1949, which refers to it, and which reads as follows:

"The county clerk shall, within thirty days after the county court has established any new township, or changed the boundary lines of any or all the townships in their respective counties, transmit to the secretary of state, who shall keep a record of the same, an abstract of such division or change, giving the bounds of such townships the name designated, and said county clerk shall record, in a book kept for that purpose, a description of each township as fully as in such report to the secretary of state."

From the above, it seems clear that under Section 65.530, supra, the county court of a county under township organization may change the boundary lines of townships, increase the number of townships, and decrease the number of townships, when the provisions of the section are followed, which includes a petition by one-fourth of the voters of the townships affected, and a vote upon the matter.

Honorable Elvis A. Mooney

We stated above that Section 47.010, supra, applied to counties generally. We feel that in the instant situation Section 65.530 should apply to your situation, since you are a township organization county, and since Section 65.530, supra, specifically applies to such counties.

CONCLUSION

It is the opinion of this department that the county court of a county operating under township organization has the power to change a township boundary line upon the receipt of a petition signed by not less than one-fourth of the voters of the township or townships affected, which petition is followed by a vote in the township or townships affected, and which proposition for change is ratified by a majority of not less than two-thirds of the votes cast.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

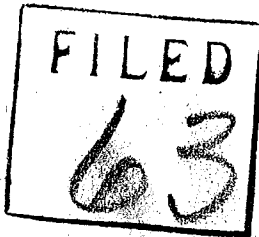
Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

CANDIDATES:
ELECTIONS:

In a case where persons seeking nomination for a public office do not have similar names, it would be improper for one of these candidates to have the prefix "Attorney" or "Atty." before his name on the ballot.



July 19, 1954

Honorable Elvis A. Mooney
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Three candidates are seeking the nomination for Judge of the Magistrate Court in the Democratic Primary; two candidates are not lawyers, but they are former Justices of the Peace; one candidate is a duly licensed attorney-at-law.

"The candidate, who is a Lawyer, requests the County Clerk and the County Court to place his name on the official ballot as follows: Atty. John Doe. Apparently this is requested to establish himself as a Lawyer as distinguished from the other two candidates who are non-Lawyers. One of the other candidates protested and insists that the abbreviation thereof signifying Lawyer or Attorney-at-Law is improper on the official ballot.

"The members of the County Court and the County Clerk have requested this office to request your opinion in regard to their duty in the above mentioned controversy: That is, whether or not the County Court and the County Clerk are authorized, in law, to place any word or abbreviation thereof signifying Attorney-at-Law (especially the abbreviation Atty.) before the name of any candidate, for Judge of the Magistrate Court, on the official ballot, in

Honorable Elvis A. Mooney

the Democratic Primary Election this August 3rd.

"Your opinion in this matter will resolve a difficult situation; and the same is needed before the 19th day of this month; that date being the last date the County Court is in session before the official ballots are ordered printed."

We first note that we are unable to find anything in Missouri statutory or case law which would, either directly or by implication, sanction the placing of the word "Attorney" or its abbreviation before the name of a primary candidate on the primary ballot.

In regard to what shall appear on a primary ballot, Section 120,340, RSMo 1949, states:

"The name of no candidate shall be printed upon any official ballot at any primary election unless such candidate has on or before the last Tuesday of April preceding such primary filed a written declaration, as provided in sections 120,300 to 120,650, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:

"I, the undersigned, a resident and qualified elector of the (_____ precinct of the town of _____), or (the _____ precinct of the _____ ward of the city of _____), or the _____ precinct of _____ township of the county of _____ and state of Missouri, do announce myself a candidate for the office of _____ on the _____ ticket, to be voted for at the primary election to be held on the first Tuesday in August, _____, and I further declare that if nominated and elected to such office I will qualify.

_____."

Honorable Elvis A. Mooney

In regard to ballots in the election, Section 111.420
RSMo 1949 states in paragraph 1:

"Every ballot printed under the provisions of this chapter shall contain the names of every candidate whose nomination for any office specified on the ballot has been certified or filed according to the provisions of chapter 120, and no other names. The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot; all nominations of any political party or group of petitioners being placed under the party name designated by them in their certificates of nomination or petitions, and the ballot shall contain no other names, except that in place of the names of candidates for electors of president and vice-president of any political party or group of petitioners, there shall be printed within a bracket, immediately below the circle in the column of said party, with a square to the left of such bracket, the names of the candidates of each political party for president and vice-president. The names of the candidates of the several political parties for electors of president and vice-president shall not be printed on the ballot, but shall after nomination, be filed with the secretary of state." (Emphasis ours.)

Paragraph 5 of the same section states, in part:

"As nearly as practicable the ballot shall be in the following form:

| " OFFICIAL BALLOT | | DATE |
|-------------------|----------------|----------------|
| DEMOCRATIC | REPUBLICAN | SOCIALIST |
| ○ | ○ | ○ |
| For President | For President | For President |
| and | and | and |
| Vice-President | Vice-President | Vice-President |
| () _____ | () _____ | () _____ |

Honorable Elvis A. Mooney

| | | |
|---|---|---|
| For Governor () _____ | For Governor () _____ | For Governor () _____ |
| <hr/> | | |
| For Lieutenant Governor () _____ | For Lieutenant Governor () _____ | For Lieutenant Governor () _____ |
| <hr/> | | |
| For Secretary of State () _____ | For Secretary of State () _____ | For Secretary of State () _____ |
| <hr/> | | |

As we stated before, nothing in the above would appear to contemplate that anything other than the name of the candidate can appear on either the primary ballot or the election ballot.

We believe that the law on this matter is correctly stated in the following portion of Section 161, p. 238, Vol. 29, C.J.S.:

"It is unlawful to place any characterization or description either before or after the name of a candidate, unless there is such identity of names as would justify such description in order to permit the voter to make an intelligent expression of his choice. Thus, the purpose of a statute requiring the adding to the name of a candidate whose surname is the same as another candidate a prescribed number of words indicating the occupation and residence is to avoid confusion that may arise from the appearance on the ballot of identical surnames, but the statute does not apply where the surnames are not identical but merely of similar sound. However, where a statute provides for the printing of the occupation of a candidate or candidates having the same or similar surnames, the use of the word 'similar' in connection with 'same' indicates a legislative intent that the statute be applied where the names are alike but not identical."

It does not appear that there is any similarity of the names of the candidates for the nomination for magistrate. Accordingly, we believe that it would not be proper to carry

Honorable Elvis A. Mooney

the prefix "Atty." before the name of a candidate on the ballot.

CONCLUSION

It is the opinion of this department that, in a case where persons seeking nomination for public office do not have similar names, it would be improper for one of these candidates to have the prefix "Attorney" or "Atty." before his name on the ballot.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW:ld,vlw

SCHOOL DISTRICTS:
ELECTIONS:
RESIDENTS:
VOTERS:



Destruction of county records by fire and subsequent drawing of supposed map by a former Judge of the County Court does not constitute a change of boundary lines of school district; a person who was a resident of an adjoining district before the fire and drafting of the map, is not made a resident of another district merely because the supposed map shows him to be a resident of such district. Since such person is not a resident of the district in question he is not a qualified voter at school elections held therein.

July 19, 1954

Honorable Richard D. Moore
Prosecuting Attorney
Howell County
West Plains, Missouri

Dear Mr. Moore:

By letter dated June 23, 1954, you requested an opinion from this office as follows:

"In a certain (common) school district, there is a party who votes in the regular elections of this district. By the records of the school district this party is not a resident of the district in which he votes. However, the records of the county burned sometime ago in the Court House and after the records burned, a former Judge of the County Court drew from memory a map of the school district and established this party a resident of the district where he now votes. Before this he was a resident of an adjoining district. The residents of the school district now want to know if this map which is being used to establish the party's residence would have any legal force or effect."

The qualifications required of voters in school district elections are set forth in Section 165.207, RSMo 1949:

"* * * A qualified voter within the meaning of this chapter shall be any person who, under the general laws of

Honorable Richard D. Moore:

this state, would be allowed to vote in the county for state and county officers, and who shall have resided in the district thirty days next preceding the annual or special meeting at which he offers to vote."

Your letter states that the person in question was a resident of an adjoining district before the Courthouse and county records burned, and before a purported map of the school district in question was drawn by a former Judge of the County Court from his memory. The question presented is whether the burning of the records and the subsequent drawing of a supposed map of the school district in the manner set forth in your letter, effected a change in the boundary line of the school district. Provision for change of boundary lines of common school districts is made by Section 165.170, RSMo 1949, as follows:

"1. When it is deemed necessary to form a new district, to be composed of two or more entire districts, or parts of two or more districts, to divide one district to form two new districts from the territory therein, to divide one district and attach the territory thereof to adjoining districts, or to change the boundary lines of two or more districts, it shall be the duty of the district clerk of each district affected, upon the reception of a petition desiring such change, and signed by ten qualified voters residing in any district affected thereby, to post a notice of such desired change in at least five public places in each district interested fifteen days prior to the time of the annual meeting, or by notice for same length of time published in all the newspapers of the district; and the voters, when assembled, shall decide such question by a majority vote of those who vote upon such proposition. If the assent to such change be given by the annual meetings of the various districts thus voting, or by the parts of the district to be divided, each part voting separately, the district or districts shall

Honorable Richard D. Moore:

be deemed formed or the boundary thus changed from that date; but if one or more of the districts affected vote in favor of such change and one or more of such districts vote against such change, the matter may be referred to the county superintendent of public schools; and upon such appeal being filed with him, in writing, within five days after the annual meeting, he shall appoint four disinterested men, resident taxpayers of the county, who, together with himself, shall constitute a board of arbitration, whose duty it shall be to consider the necessity for such proposed change and render a decision thereon, which decision shall be final. When there is an equal division, the county superintendent shall cast the deciding vote.

"2. The superintendent shall, at the time of the appointment of these members of this board of arbitration, notify them to meet him at some convenient place in the county within fifteen days after annual school meeting, where the deliberations of the board shall take place and its decision be rendered. But in making such change the decision in all cases shall conform to the propositions contained in the notices and voted upon at the annual meeting; and the county superintendent shall, on or before the last day of April, transmit the decision to the clerks of the various districts interested, or to the clerk of the district divided, and said clerk or clerks shall enter the same upon the records of his or their respective district or districts; and the said board of arbitration shall be allowed a fee of fifteen dollars to be paid by the district or districts taking the appeal at the time said appeal is made; provided, however, that no new district shall be created or boundary line changed by which any district shall be formed containing

Honorable Richard D. Moore:

within its limits by actual count less than twenty persons of school age, or by which any district shall be left containing within its limits by actual count less than twenty persons of school age; provided, however, the resident voters upon any island in any of the navigable rivers of this state may organize into a school district without being subject to the restrictions in the preceding portion of this section. It is further provided that, in changing the boundary line between the two established districts, one district shall not encroach upon the other simply for the acquisition of territory.

"3. At all elections to change boundaries, the votes of those parties residing in the territory sought to be attached to or detached from a district shall be separately cast and separately counted by the parties or officers holding such election; provided further, that if in any school district or districts of the state a stream of running water shall in any way interfere with the convenient access of school children to the schoolhouse or houses of any such district or districts, then it shall be lawful to create a new district, to be composed of two or more districts or parts of two or more districts, or of one entire district and parts of one or more districts, lying in whole or in part in two counties in the manner herein set out; and in the event of an appeal being taken, as herein provided, from the action of the school meetings on the proposed formation of such district, such appeal shall be taken to the county superintendents of the respective counties; and such superintendents shall thereupon be empowered to jointly appoint a board of arbitration, who shall thereupon act as herein set out; and in the event of a tie vote, such superintendents shall select an additional member of such board

Honorable Richard D. Moore:

of arbitration, whose decision shall be final; and such decision shall be transmitted to the clerks of the districts affected thereby."

It is obvious that the burning of the records and the subsequent drawing of a supposed map of the school district by a former Judge of the County Court is not substantial compliance with the above section, and, therefore, was not effective in changing the boundary of the school district. We must conclude that the person in question is a resident of the adjoining district of which you speak, and, therefore, is not a qualified voter in the district in which he does not reside.

CONCLUSION

In the premises therefore, it is the opinion of this office that the destruction of county records in a fire and the subsequent drawing of a supposed map of a school district by a former Judge of the County Court does not constitute a change of boundary lines of the school district in question, and, therefore, a person who was a resident of an adjoining district before the fire and the drafting of the map, is not made a resident of another district merely because the supposed map shows that he is a resident of such district. Since such person is not a resident of the district in question he is not a qualified voter at school elections held therein.

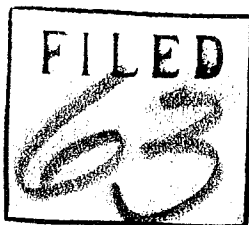
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk

SCHOOLS: School district not having a high school is liable
TUITION: for tuition, less fifty dollars, of student residing
in said school district while attending high school
in another district.



September 20, 1954

Honorable Richard D. Moore
Prosecuting Attorney
Howell County
West Plains, Missouri

Dear Mr. Moore:

This will acknowledge receipt of your request for an opinion which for the sake of brevity we shall restate.

You inquire if, under the following facts, the Homeland School District is liable for said student's tuition during the last school year at West Plains High School:

There was no high school in said Homeland School District during the last school year. When this student started going to West Plains High School, his parents were residing in the Homeland School District in their own home. Thereafter, his father and mother left for Kansas City, Missouri, where the father found employment. Their son and student moved in with a neighbor in a different school district -- the Renfrow School District; however, both districts are located in Howell County, Missouri.

The intent being that said student would remain with his neighbor only so long as his father was employed in Kansas City, Missouri, the father's intention was not to move his household effects or his residence from said school district but went to Kansas City on a temporary basis only to obtain employment and remain there only so long as he might be

Honorable Richard D. Moore

employed, still retaining ownership of land and his home complete with his furnishings in said Homeland School District.

During the year, the father frequently returned to said school district, especially on weekends during November, at which time his son and student would live with his parents at home. After Christmas, the father returned to Kansas City for work and said student returned to the home of his neighbor. The student still continued on weekends to meet his parents at their home in Homeland School District. Shortly after the school year, the father returned to his home in Homeland School District and his son remained with him. Shortly thereafter, the whole family and student went to Kansas City for work. In August of this year the whole family returned to Homeland School District.

Such are the facts as related in your request.

We are enclosing a copy of an opinion rendered by this department under date of September 13, 1948 to Honorable Joe W. Collins, Prosecuting Attorney of Cedar County, Missouri, holding that a school district not maintaining a high school must pay the tuition of its pupils residing therein when attending high school in another district less an amount of fifty dollars to be paid by the state, and in case the state allotment does not amount to fifty dollars, then the pupil parent or guardian of said student is liable for the difference between the amount allotted by the state and fifty dollars.

The particular statute that was construed in said opinion was Section 10458, Mo. St. Ann., Laws of Missouri 1945, page 1557. This statute has been amended and now is known as Section 165.257 Missouri Revised Statutes Cumulative Supplement 1953. However, the statute, as amended, is still applicable and does not in any manner affect the conclusion reached in the foregoing opinion.

Honorable Richard D. Moore

Therefore, in view of the foregoing opinion, your request boils down to whether or not said pupil, during the last school year, was a resident of Homeland School District. If so, the said district is liable for the full tuition minus the fifty dollars state allotment, and if said pupil was not a resident of said school district, then the tuition is no obligation of said school district.

The word "resident" is used in many different statutes, and has been defined as used in some statutes; however, as used in statutes relating to school matters the Legislature has not given it a statutory definition.

In *Mansfield Twp. Bd. of Education v. State Board of Education*, 129 A. 765, 766, 101 N.J.L. 474, the court held that it is established that the permanent residence of a father is that of a child. However, a child who is brought into the state by the parent or guardian for purpose only of receiving education in the public schools of the state is not a resident of said state. In *Ptak v. Jameson*, 220 S.W. (2d) 592, 595, 215 Ark. 292, the court approvingly quoted from a case holding that the fact that a student had served in the Army and upon his discharge had entered the university under a GI Bill of Rights did not render him a resident of the city wherein said university was located. In order for him to become a resident of said city would require a bona fide intention to make the city his home for an indefinite period not limited to time necessary to obtain an education.

In the case of *State ex rel. v. Clymor*, 164 A. 671, 147 S.W. 1119, a case where the Springfield Court of Appeals had before it the meaning of the word "resident" as used in Section 10785, R.S. Mo. 1909, now Section 10340, R.S. Mo. 1939, a boy who was making his home with his grandfather in the town of Steelville, but whose father resided in the city of Springfield, was considered as not a resident of the Steelville School District. And, in the earlier case of *Binde v. Klinge*, 30 Mo. App. 285, a girl who was living with her grandmother in Hermann and whose father and mother members of the family resided in Montgomery County, was considered as not a resident of the Hermann School District.

See also *Southeastern Greyhound Lines v. Conklin*, 196 S.W. 2d 961, 962, 303 Ky. 87, wherein the court held that residence indicates permanence of occupation as distinct from lodging or boarding, or temporary occupation; State

Honorable Richard D. Moore

ex rel. Webber v. Hathaway, 28 O.C.D. 481, 483, 22 Cir. Ct. R.N.S. 314, wherein the court held that residence of a person is the place where his habitation is fixed without any present intention of removing therefrom, and to which whenever he is absent he has all intentions of returning; and Johnson v. Haile, 199 N.Y. Sup. 875, 205 App. Div. 633, wherein the court held that a residence means a permanent residence, one's home as distinguished from a mere stopping place for transaction of business or pleasure.

From the foregoing definitions it would seem that a person of school age is a resident where the parents reside, for a minor is not in law considered as capable of establishing a residence except in exceptional circumstances.

Therefore, in view of the foregoing decisions construing the word "resident," we believe that under the facts stated herein the parents of said student were at all times during the last school year residents of Homeland School District, and likewise, said student was a resident of said school district. This being true, the Homeland School District would be liable under Section 165.257, supra, for the school tuition, less fifty dollars, for said student attending West Plains High School.

CONCLUSION

It is the opinion of this department that the parents of said pupil, under the foregoing decisions defining the word "resident," were during said school year at all times residents of Homeland School District, and by reason thereof their son and student referred to herein was a resident of the same school district and, therefore, said district is liable for the school tuition of their son and pupil while attending West Plains High School, minus the fifty dollars for the allotment allowed by law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Aubrey R. Hammett, Jr.

Yours very truly,

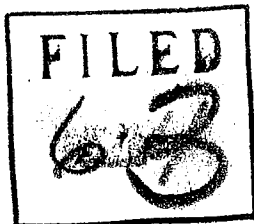
JOHN M. DALTON
Attorney General

Enc: Opn.
Hon. Joe W. Collins
9-13-48

ARH:sm,vlw

MOTOR VEHICLES:
MOTOR VEHICLE
REGISTRATION RECIPROCITY:

Motor vehicle owned by Alabama corporation and used for commercial purposes or "for hire" hauling in Missouri must be registered in the State of Missouri.



October 8, 1954

Honorable Elvis A. Mooney
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"This office is confronted with the following problem:

"A corporation organized under and existing by virtue of the Laws of the State of Alabama is totally owned by stockholders resident in the State of Missouri; all officers of the corporation also are residents of the State of Missouri; this corporation has no registered business address in the State of Missouri and has not qualified, according to law, to do business in Missouri.

"The above corporation owns a truck licensed in the State of Alabama, but not licensed in the State of Missouri, which picks up produce in various States and passes through the State of Missouri with its load; occasionally this produce is discharged in the State of Missouri; the produce is owned by this corporation while in transit and until discharged from its truck.

"Will you please inform this office whether or not a truck so owned and operated should be licensed in Missouri? This information

Honorable Elvis A. Mooney

is requested for the Highway Patrol in connection with the operation of the State Weighing Station at Dexter, in Stoddard County."

Reciprocity with respect to the registration of motor vehicles in the State of Missouri has been extended to nonresidents under the provisions of Section 301.270 RSMo 1949, which reads as follows:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

Simply stated, this statute extends the same degree of exemption from registration to nonresidents as the state of domicile of such nonresidents extends to residents of the State of Missouri. We therefore, of necessity, must examine pertinent statutory enactments of the State of Alabama in order to determine the answer to your question.

The Alabama reciprocity statute is found as Section 707, Title 51, Code of Alabama 1940. This section reads as follows:

"The provisions of the foregoing sections relative to registration and display of registration numbers shall not apply to a motor vehicle owned by a non-resident of this state and not used for hire (or used for commercial purposes) in this state, for

Honorable Elvis A. Mooney

a period of thirty days from date of entering the state, provided that the owner thereof shall have complied with the provisions of the law of the foreign country, state, territory or federal district of his residence relative to registration of motor vehicles and the display of registration numbers thereon, and shall conspicuously display his registration number as required thereby; provided further, that nothing herein shall be construed to permit the use of motor vehicles for hire (or for commercial purposes) by non-residents without complying with the provisions of this article. Provided further, that motor vehicles of non-residents used for commercial purposes and making not more than two trips per month, each such trip to be of not more than five days duration, may secure permit from the probate judge of the first county in this state which he enters, under such rules as the department of revenue may prescribe and upon the payment to the probate judge of a permit fee of one dollar and an issuance fee of fifty cents which permit shall grant the holder thereof two trips as above set forth during the month in which said permit is issued. Provided, that motor vehicles of non-residents used for hire and making not more than three trips during any period of three months in this state and which pay all mileage taxes required by law, may secure a permit from the department of revenue under such rules as the department of revenue may prescribe and upon the payment to the probate judge of a five dollar fee and an issuance fee of fifty cents for each trip of the first county entered in this state; provided each trip shall be reported to the department of revenue and said probate judge and no such motor vehicle shall make more than three trips in this state during any three month period and no such motor vehicle shall carry anything but goods to be transferred from without the state to points within the state, but such motor vehicle may, on its return trip, secure permit from a probate

Honorable Elvis A. Mooney

judge after the additional payment of five dollars and an issuance fee of fifty cents, to carry goods on its return trip from points within Alabama to points without Alabama. Said permit shall be issued for a specified motor vehicle and shall not be transferable to any other person or any other vehicle. The department of revenue of Alabama is hereby authorized to make reciprocal agreements with other states for an exchange of rights for the operation of motor vehicles that will be considered as a fair exchange of rights and privileges. The said rights and privileges to be in effect as long as both contracting parties recognize the rights of the other. The above reciprocal agreement can be annulled on a notice issued to either party by the other party thereto within thirty days thereafter."

It appears from your letter of inquiry that the operations conducted by the Alabama corporation within the State of Missouri are for "commercial purposes" as that term is used in the applicable Alabama statute. We assume that the operations conducted are more or less regular and recurring, inasmuch as nothing to the contrary appears from your letter of inquiry.

Upon this basis, we therefore are led to the conclusion that no exemption from Missouri statutes relating to registration is to be enjoyed by the Alabama corporation owning the motor vehicle. The Alabama reciprocity statute specifically excludes from its application motor vehicles owned by nonresidents which are used either for hire or for commercial purposes in that state.

Further, we believe that even though the operations conducted in Missouri by the Alabama corporation are intermittent and irregular, such motor vehicle would still be required to be registered in this state. It is true that the State of Alabama has made provisions for the issuance of temporary permits to nonresidents who conduct operations limited in number within that state, but no similar provision appears in the registration laws of the State of Missouri. Therefore, we believe that it would be necessary to comply with such registration laws of this state in any event.

In addition to the foregoing, we note that under Section 243, Title 48, Code of Alabama 1940, a mileage tax is imposed

Honorable Elvis A. Mooney

upon motor transportation companies which are under the jurisdiction and control of the Public Utilities Commission of the State of Alabama. Again, the State of Missouri has no similar tax, usually denominated a "mileage tax."

CONCLUSION

In the premises, we are of the opinion that a motor vehicle owned by an Alabama corporation which is used for commercial purposes within the State of Missouri is required to be registered in accordance with the laws of this state.

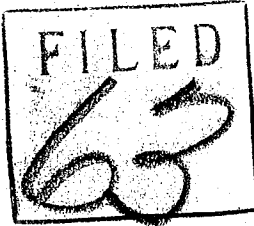
The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

Lottery: : A promotional scheme wherein the promoter in
: his effort to increase the sales of his product
Gambling: : offers to give a cash prize to a portion of the
: purchasers of his product constitutes a lottery.
.....



November 19, 1954

Honorable J. Hal Moore
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Sir:

By your letter of October 26, 1954, you requested an opinion of this office as follows:

"Enclosed find a copy of an advertisement which is self-explanatory and was run in the Aurora Advertiser. We would like to receive an opinion from your office as to whether or not this promotional scheme is a lottery."

The relevant part of the advertisement to which you refer reads:

"WATCH FOR THE T_____ CALLER

"Win Up to \$6.00 For Having T_____ Milk in your Refrigerator

"You've always known that T_____ Dairy Products give you extra satisfaction. Now get set for another bonus - - - in cash! The T_____ Caller will be in your neighborhood this week. He'll stop by to see if you have T_____ products in your refrigerator, and he'll pay you \$6.00 if he finds T_____ milk. Stock up on T_____ products now and get a bonus in dollars when the T_____ Caller knocks on your door."

The fundamental policy in this State toward lotteries is established by Article III, Section 39, Constitution of

Honorable J. Hal Moore:

Missouri, 1945, which reads:

"* * * The general assembly shall not have power:

* * * * *
* * * * *

"(9) * * * To authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; * * *."

Section 563.430, RSMo 1949, which proscribes lotteries, reads as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

The Supreme Court of Missouri in State ex inf. McKittrick vs. Globe Democrat Publishing Company, 341 Mo. 862, 110 S.W. (2d) 705, discussed the above provisions in the following manner, l.c. 713:

Honorable J. Hal Moore:

"It will be noted both the Constitution and statute prohibit any scheme in the nature of a lottery; and it has been several times held that within their meaning and intent a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance. State v. Emerson, 318 Mo. 633, 639, 1 S.W. 2d 109, 111. The word has no technical meaning in our law. Lotteries are judicially denounced as especially vicious, in comparison with other forms of gambling, because by their very nature they are public and pestilentially infect the whole community. They prey upon the credulity of the unwary and widely arouse and appeal to the gambling instinct. State v. Schwemler, 154 Or. 533, 60 P. 2d 938; State ex rel. Home Planners Depository v. Hughes, 299 Mo. 529, 537, 253 S.W. 229, 231, 28 A.L.R. 1305, 1310; State v. Becker, 248 Mo. 555, 562, 154 S.W. 769, 771.

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. * * *."

We will now examine the scheme at hand to see if it contains those three elements.

To be eligible for the cash award it is necessary for a person to acquire and keep on hand a certain brand of milk, the sale of which is being promoted by the scheme. We conclude that the purchase and storage of the milk sold by the promoter constitutes "consideration". From the standpoint of consideration this case does not differ materially from State vs. Mumford, 73 Mo. 647, 39 Am. Rep. 532. In that case the subscriber to a certain newspaper received the newspaper and a ticket which might draw a prize. The subscription price of the paper was not raised and the value of the ticket was included in the subscription price. The Court concluded that the scheme was a lottery saying, i.e. 651:

"* * * The fact that the subscription price of the Times was not increased, does not alter the character of the scheme, inasmuch as the price paid entitled the subscriber to a ticket in the lottery as well as to a copy of the paper. * * *."

Honorable J. Hal Moore:

In the situation at hand the price of the milk presumably remains the same. However, it is obvious that the expense of conducting the scheme must ultimately be borne by the purchasers of the product, and that there is hidden in the price of the milk a sum to defray the expenses of the promotional scheme.

The payment of cash to those persons who are called upon, and who have the particular brand of milk in the refrigerator, is so obviously a "prize" that no discussion is needed upon that aspect of the scheme.

The advertisement does not, in itself, conclusively indicate the element of chance. A literal interpretation of the advertisement would lead the reader to believe that a representative of the promoter would call at every home likely to be reached by the advertisement, and that each person having milk of the desired brand would receive \$6.00 in cash. If that were the essence of the scheme, we would conclude that no "chance" exists, because every person purchasing and storing the particular brand of milk would, with dead certainty, receive \$6.00 in cash. If, as is likely, the representative of the promoter calls at only a selected number of homes, not every person purchasing and storing milk of the brand being promoted, would receive a cash prize. In the latter situation there would be "chance", because not every person participating in the scheme would win, and the purchasers of the milk would presumably not know at whose home the "caller" would appear. It is not essential to a lottery that the selection of the winners be done by the casting of lots or the drawing of names. Thus, in *State vs. Emerson*, 318 Mo. 633, 1 S.W. (2d) 109, the following method of choosing the winner satisfied the requirement of "chance", 1.c. 110:

"Appellant and other agents of the company stated to prospective customers and dissatisfied contract holders that there was a drawing at the office of the company every Saturday afternoon from which the public was excluded, and in some cases these representations were to the effect that the drawings were by lot; that is,

Honorable J. Hal Moore:

drawing names from a box. In some instances where the customer was one 'best known in the neighborhood,' it was hinted that the drawing was done at will or pleasure, and not by lot. A former employee of the company testified that the discounting was always done at will, upon recommendation of the crew managers, and that the 'discounts' went to those whose influence and efforts in the community would best 'help the company.'"

This scheme is nothing more than an attempt to increase the sales of a particular brand of milk by appealing to the human desire to take a chance on receiving an undue return for an expenditure of money or other valuable thing. This appeal is the essence of every scheme in the nature of a lottery, whatever the guise in which it appears, and we conclude that this scheme is a lottery.

Conclusion

In the premises, therefore, it is the opinion of this office that a promotional scheme, wherein the promoter in his effort to increase the sales of his product offers to give a cash prize to some of the purchasers of his product, the identity of the recipients of the prize being unknown to the purchasers, constitutes a lottery.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

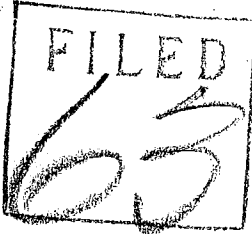
Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk

DIVISION OF RESOURCES
AND DEVELOPMENT:
STATE MUSEUM:

Exhibits accepted for display in state museum to be retained or returned to owner in accordance with terms under which exhibit has been placed in state museum.



December 14, 1954

Mr. H. H. Mobley, Director
Missouri Division of Resources
and Development
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"In 1943 the State Museum was transferred to the jurisdiction of the Commission of Resources and Development. The State Museum had in force at that time a loan policy. Miscellaneous material was accepted from people on a loan basis, frequently without analysis as to its value for museum purposes. Such a policy inevitably led to the amassing of large quantities of artifacts, historical items and Missouriana. Much of it is of questionable value.

"The Missouri Resources and Development Commission abolished the loan policy and today accepts only gifts.

"The last Legislature appropriated a sum of money to permit the Commission to re-appraise its storerooms to get rid of useless material. This question now arises:

"In 1926 a Mrs. Guenther, then residing in Jefferson City, placed some items in the museum on loan. The items are of little commercial value but would perhaps have some sentimental value to the donor. In

Mr. H. H. Mobley, Director

attempting to return this loan we have made every effort to locate Mrs. Guenther but have not been successful. It is my opinion she is dead and so we have also tried to locate a daughter who moved from Jefferson City in the '30s. We have been unsuccessful in locating anyone connected with the family.

"Since the material is of no value to the museum and since this is only one example that we expect to recur numerous times, we would appreciate your advising us as to what liability we might incur if we disposed of this material. Disposition might be by several means. Some material because of its worthlessness probably would be hauled to the dump, anything which had some value but not usable in the State Museum would be made available to city and school museums throughout the state.

"Specifically, we would appreciate an opinion as to whether or not the Division of Resources and Development would incur liability by disposition of such material, after having made every effort to return it to its donor."

At the outset, we will dispose of the question relating to the exhibit received from the lady mentioned in your letter of inquiry. Upon receipt of the letter, and through the cooperative efforts of your department and of this department, a relative of the lady was located and we are now advised that the exhibit placed in the museum by her has been returned.

However, the over-all question remains as to the liability of the Division of Resources and Development, or individual members or employees thereof, arising from the disposition of exhibits whose ownership is unknown or whose owners may not be located.

The lapse of a long period of time between the placing of an exhibit with the state museum and the present, coupled with the failure of the owner thereof to make demand for its return, might be thought to constitute an "abandonment" thereof so that the State of Missouri might thereupon succeed to the title thereto. However, this, we find, will not be the result under

Mr. H. H. Mobley, Director

the conditions outlined, for the reason that under Missouri law such abandonment occurs only when an actual intent to abandon on the part of the owner coincides with the fact of failure to assert possessory rights. This phase of the Missouri law is derived from the Spanish law and has been repeatedly expressed in decisions of the appellate courts of this state. See Equitable Life Assurance Society of U.S. v. Mercantile-Commerce Bank & Trust Co., 155 Fed. 2d 776, Cert. Den. 67 Supreme Court 114, 329 U.S. 760, 91 L. Ed. 655; Clark v. Hammerle, 36 Mo. 620; Gerber v. Appel, 164 S.W. 2d 225, opinion quashed in part State ex rel. Appel v. Hughes, 173 S.W. 2d 45, 351 Mo. 488, and other cases cited therein.

The rule is perhaps most concisely set out in Gerber v. Appel, 164 S.W. 2d 225, from which we quote, l.c. 228:

" * * * 'Abandonment,' in law, is defined to be the relinquishment or surrender of rights or property by one person to another. It includes both the intention to abandon and the external act by which the intention is carried into effect. To constitute an abandonment there must be the concurrence of the intention to abandon and the actual relinquishment of the property, so that it may be appropriated by the next comer. * * *"

You have referred to a "loan policy" having been in force prior to the state museum having been placed under the control of the Commission of Resources and Development. We are advised that such "loan policy" was not carried out through the medium of written agreements, and therefore copies of such agreements are unavailable. In the absence of such agreements, we can but direct your attention to certain general rules applicable to bailments. It is our thought that the placing of an exhibit with the state museum does constitute a bailment. Absent an express agreement to the contrary, bailments are terminable at will. Other factors which may bring about such a termination of the bailment may arise from destruction of the subject matter, by the conduct of the parties, by completion of the purpose of the bailment, or by lapse of time in accordance with the terms of the bailment. The general rule in this regard is found in "Bailments" 8 C.J.S., p. 321, from which we quote:

"A bailment may be terminated by agreement or conduct of the parties, by destruction of the subject matter, by completion of its

Mr. H. H. Mobley, Director

purpose, or by lapse of time in accordance with its terms. The death of bailor or bailee may terminate a bailment for the sole benefit of either."

Apparently, bailments here under consideration are also terminable by the state museum in its capacity as bailee. Upon such termination occurring, the bailor, who in this instance is the owner, is entitled to possession of the property. However, since in your case the converse of this situation presents the problem, viz., a desire to voluntarily return the bailed property, it becomes necessary to determine what steps must be taken to effectuate the termination of the bailment.

It is fundamental in such cases that notice of such termination be given by the bailee to the bailor. We quote from Truck Leasing Corp. v. Swope, et al., 248 S.W. 2d 84, 1.c. 86:

" * * * We have no fault to find with defendants' statement that a bailment for an indefinite time is terminable at will. * * *"

Inasmuch as the facts stated in your letter of inquiry indicate that such notice cannot be given, we are at a loss to determine how the bailment can be terminated. Of course, the assertion of a claim of unqualified ownership, adverse to the rights of the true owner, would initiate the period of limitations. Upon the expiration of the applicable period, title to the property would then become vested in the State of Missouri, and the subsequent disposal thereof would be governed by the general laws relating to personal property belonging to the state. However, we feel that it is doubtful that the State of Missouri, acting through an administrative agency, would wish to assume such an adversary position with persons who have placed exhibits in the state museum.

In the alternative, it seems that it will be necessary that the exhibits be kept safely stored, exercising reasonable care for their preservation, until such time as the true owner may be located. Until such time has elapsed, it is our thought that any disposal or destruction of the exhibits would constitute a trespass upon the property rights of the true owner thereof.

CONCLUSION

In the premises, we are of the opinion that the bailment of exhibits placed in the state museum may be terminated only in

Mr. H. H. Mobley, Director

accordance with the terms of such bailment and that, in the absence of any agreement for the termination thereof, such bailment may be terminated only by notice to the true owner of such exhibits.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

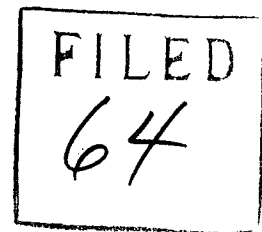
CORONERS:
DEATH CERTIFICATES:
HEALTH OFFICER:
VITAL STATISTICS:

In cases of death where there is no physician in attendance upon the death of the deceased person, and death is not such as to bring it within the jurisdiction of the coroner, the person in charge of interment may, during the incapacity of the local registrar to perform his duties, directly notify the local health officer, and said local health officer should complete the certificate of death, in accordance with Section 193.140, RSMo 1949.

OPINION NO. 64

February 15, 1954

Honorable Richard D. Moss
Assistant Prosecuting Attorney
Jasper County
Snyder Building
Carthage, Missouri



Dear Sir:

By letter dated February 1, 1954, you requested an official opinion, as follows:

" * * * The coroner refused to sign death certificates unless there is a question of suicide, accidental death or homicide. The local registrar of this district is in the hospital, therefore he is unable to sign as medical attendant on such deaths.

"The coroner has ordered Dr. K. E. Baker, county physician for the eastern district of Jasper County, to sign such certificates. Dr. Baker would like to know whether he should sign certificates for persons who die without being attended by a physician, such as persons found dead.

"Please give us an opinion as who should sign the death certificates in such cases. Whether it be the county physician or the county coroner. Then we could pass such information to the coroner, county physicians and funeral service firms. * * * "

We assume that the "county physician" to which you refer in your letter is a county health officer appointed pursuant to Section 192.260, RSMo 1949:

Honorable Richard D. Moss

"The county courts of the several counties of this state may appoint a duly licensed qualified physician as a county health officer for a term of one year, and in the event a vacancy is created in the office of the county health officer, such court may appoint a duly licensed qualified physician for the unexpired term. If the county court of any county decides to appoint a county health officer as empowered in this law, it shall agree with the officer as to the compensation and expenses to be paid for such service, which amount shall be paid out of the county treasury of the county. Nothing contained herein shall be construed to require the county court of any county to appoint a county health officer in any county."

Upon presentation, by the person in charge of interment of a dead body, of a certificate of death to the physician last in attendance or to the coroner in those cases in which he has jurisdiction, said last attending physician or coroner must certify thereon the cause of death according to his best knowledge and belief. This is required by Paragraphs 1 and 2 of Section 193.140:

"1. The person in charge of interment shall file with the local registrar of the district in which the death or stillbirth occurred or the body was found a certificate of death or stillbirth within three days after the occurrence.

"2. In preparing a certificate of death or stillbirth the person in charge of interment shall obtain and enter on the certificate the personal data required by the division from the persons best qualified to supply them. He shall present the certificate of death to the physician last in attendance upon the deceased or to the coroner having jurisdiction who shall thereupon certify the cause of death according to his best knowledge and belief. He shall present the certificate of stillbirth to the physician, midwife or other person in attendance at the stillbirth, who shall certify the stillbirth and such medical data pertaining thereto as he can furnish."

Honorable Richard D. Moss

Paragraph 3 of Section 193.140 provides for the certification of the cause of death in those cases in which there was no physician in attendance upon the dead person, and over which the coroner has no jurisdiction.

"3. Thereupon the person in charge of interment shall notify the appropriate local registrar, if the death occurred without medical attendance, or the physician last in attendance fails to sign the death certificate. In such event the local registrar shall inform the local health officer and refer the case to him for immediate investigation and certification of the cause of death prior to issuing a permit for burial, cremation or other disposition of the body. When the local health officer is not a physician or when there is no such officer, the local registrar may complete the certificate on the basis of information received from relatives of the deceased or others having knowledge of the facts. If the circumstances suggest that the death or stillbirth was caused by other than natural causes, the local registrar shall refer the case to the coroner for investigation and certification."

Thus it appears that if a death occurs without medical attendance, or if the last medical attendant refuses to certify as to cause of death, and the death is such as not to come within the jurisdiction of the coroner, the provisions of Paragraph 3 of Section 193.140 apply. In such event, the statute requires the local registrar to inform the local health officer, and such local health officer shall, if he be a physician, issue the certification of the cause of death. We conclude that the "local health officer" referred to in said Section 193.140, Paragraph 3, is the county health officer authorized by Section 192.260, supra. Having determined that in those cases in which there was no last attending physician, and the death is not such as to bring it within the jurisdiction of the coroner, the person in charge of interment must notify the local registrar, who then shall notify the local health officer for investigation and certification of cause of death, it is necessary to determine whether the person in charge of interment may, instead of notifying the local registrar who is unable to perform the duties of his office because of illness, directly inform the local health officer of the case. We conclude that if the local registrar is incapacitated from performing his duties, and he has no deputy or other authorized person to relay the notice of death to the local health officer, that the notification may be given directly by the

Honorable Richard D. Moss

person in charge of interment to the local health officer. This conclusion is based upon the premise that the relay of information from the person in charge of interment to the local health officer through the local registrar is purely a mechanical act, the omission of which would not in anywise affect the purpose of this section, i.e., to have an authorized person ascertain the cause of death.

CONCLUSION

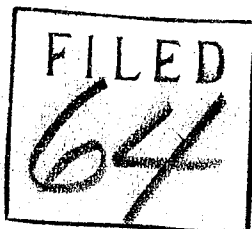
In the premises, therefore, it is the opinion of this office that in those cases of death where there is no physician in attendance upon the death of the deceased person, and the death is not such as to bring it within the jurisdiction of the coroner, the person in charge of interment may, during the incapacity of the local registrar to perform his duties, directly notify the local health officer, and said local health officer should complete the certificate of death, in accordance with Section 193.140, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

OPERATORS' LICENSE: Director of Revenue may not revoke operators' licenses of persons found guilty of violating city ordinances.



March 31, 1954

Mr. M. E. Morris
Director of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"We would appreciate having from your department an official opinion on the following question:

"Do we have authority to revoke operators' licenses of persons convicted in city courts for drunken driving, leaving the scene of an accident, or any other conviction which requires mandatory revocation of licenses in state courts?

"This information is necessary for the use of our Driver's License Division."

The duties imposed upon the Director of Revenue with respect to the revocation of operators' and chauffeurs' licenses are set forth in Section 302.271, RSMo 1949, as amended Laws of 1951, page 678:

"The director shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or

Mr. M. E. Morris

chauffeur's conviction of any of the following offenses, when such conviction has become final:

"(1) Manslaughter resulting from the operation of a motor vehicle;

"(2) Driving a motor vehicle under the influence of intoxicating liquor or a narcotic drug;

"(3) Any felony in the commission of which a motor vehicle is used;

"(4) Leaving the scene of an accident knowing that injury has been caused to a person or damage has been caused to property without stopping and giving his name, residence, including city and street number, to the injured party, or to a police officer, or to other proper person, as required by law;

"(5) Perjury or the making of a false affidavit to the department of revenue under this chapter or under any other law relating to the ownership or operation of motor vehicles;

"(6) Conviction, or forfeiture of bail not vacated, upon three charges of careless or reckless driving committed within a period of two years.

"(7) Any offenses involving the wanton and reckless operation of a motor vehicle which has resulted in the death of another."

It is a familiar principle of statutory construction that legislative enactments are to be construed in a manner to effectuate the intent of the General Assembly in their passage. In determining such intent recourse may be had to the language contained in the statute itself, statutes in pari materia, the history of the act and the mischief it was designed to remedy.

Mr. M. E. Morris

It will be observed that the first six enumerated offenses are ones which have been declared criminal by acts of the General Assembly. The seventh, which is more or less indefinite, but is rather all-inclusive, embraces several crimes. Further, all of the first five offenses enumerated are felonies. The sixth offense is an aggravated case in that before revocation is to be made thereunder there must have been three convictions of careless or reckless driving committed within a period of two years.

From the foregoing it will be seen that all of the offenses enumerated in the statutes are ones of comparative seriousness. They are of an entirely different nature than those which may be prosecuted under municipal ordinances duly enacted. In Missouri, as a matter of fact, it has long been held that prosecutions for violations of such municipal ordinances are actually civil cases and are not criminal in nature. See *Village of Marble Hill v. Caldwell*, 176 S.W. 294, 189 Mo. App. 286.

It is also to be observed that in referring to the statute quoted supra, the Legislature passed Section 302.225, RSMo 1949, as amended, Laws of 1951, page 678. This act incorporates the following significant provisions:

"1. Whenever any person is convicted of any offense or of the last of a series of three offenses for which this chapter makes mandatory the revocation of the operator's or chauffeur's license of such person by the director, the circuit court or magistrate court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses, then held by the person so convicted, and the court shall within ten days thereafter forward the same, together with a record of such conviction to the director. * * *

(Emphasis ours.)

It is apparent that the Legislature contemplated that the revocations provided in Section 302.271, RSMo 1949, as amended Laws of 1951, page 678, would be only for convictions which occurred for prosecutions of state laws in state courts. The emphasized portion of Section 302.225, RSMo 1949, as amended, Laws of 1951, page 678, seems to us to render this conclusion imperative.

Mr. M. E. Morris

CONCLUSION

In the premises we are of the opinion that the Director of Revenue of the State of Missouri does not have authority to revoke operators' licenses of persons found guilty of violations of municipal ordinances.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

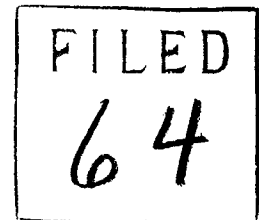
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TAXATION AND REVENUE:

Wentworth Military Academy as presently organized is not exempt from the Missouri Sales Tax upon purchases made to or sales made by such organization.

April 20, 1954

File No. 64



Mr. M. E. Morris
Director of Revenue
Jefferson City, Missouri

Attention: L. M. Chiswell, Supervisor, Sales Tax

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"Enclosed herewith you will find certified copies of the following documents filed with the Circuit Court of Lafayette County, Missouri; these having been filed by the Wentworth Military Academy of Lexington, Missouri

"Petition for Pro Forma Decree
Articles of Association.

"These are submitted for the reason that this department has always placed the Wentworth Military Academy in the category of a private school operated for profit and therefore subject to all provisions of paragraph (2) of Section 144.010 R. S. Missouri 1949. We have not changed our position but the Academy now contends that it is provided exemption by reason of the fact the Petition for Pro Forma Decree has been approved by the Court and the Decree issued.

Mr. M. E. Morris

"By mutual agreement with the Academy the department herewith requests an official opinion from your office whether the Academy qualifies for exemption from the application of the Sales Tax to its purchases and sales of tangible personal property used in the conduct of its normal functions and activities."

Two statutes relate to exemptions from the Missouri Sales Tax Act which is found as Chapter 144, RSMo 1949. They are Sections 144.030 and 144.040, RSMo 1949. The latter is applicable to the matter now under inquiry and we quote it in full:

"In addition to the exemptions under section 144.030 there shall also be exempted from the provisions of this chapter all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the department of penal institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a state relief agency in the exercise of relief functions and activities." (Emphasis ours.)

We have examined the Articles of Association and the Pro Forma Decree entered by the Circuit Clerk of Lafayette County, Missouri, pursuant to petition therefor of the Wentworth Military Academy, which you have submitted with your opinion request. It is immediately apparent that the nature of the organization is such that it is not to be classed as an educational institution supported by public funds, and therefore, to such extent the above-quoted statute is inapplicable.

That leaves for consideration the question of whether the corporation as it now exists may be classed as "charitable" within the meaning of the exemption statute. We have examined the many cases defining "charity", "charitable" and "charitable institutions." It seems that the predominate characteristics of such organizations as may qualify as "charitable" may be enumerated as follows:

Mr. M. E. Morris

(1) There must be no pecuniary benefit to any private person over and above reasonable remuneration for services actually performed on behalf of the corporation, and,

(2) The organization must devote the greater portion of its activities to the relief of the indigent even though the class of such indigents may be limited to particular religious, racial or other distinct groups.

There is no doubt but that the organization under consideration qualifies with respect to (1) above. However, it is our opinion that it does not qualify with respect to (2). It will be observed that the Articles of Association clearly disclose that it is proposed to operate the educational institution upon a basis that it will return earnings over and above the cost of operation. The only reference throughout the entire articles with respect to indigent or needy persons is the following sentence found as a part of Article VII.

"It shall have the right to establish or augment an endowment fund or funds for the carrying out of any of the purposes of the corporation, or to provide scholarships for needy and deserving students."

It is further noted that merely the "right" to do and perform such services with respect to indigent or needy students has been reserved and there is no direct obligation upon the board of trustees to in fact carry out such permissive authority. For these reasons we reach the conclusion that the Wentworth Military Academy as presently organized is not a charitable institution within the meaning of Section 144.040, RSMo 1949.

CONCLUSION

In the premises we are of the opinion that the Wentworth Military Academy as presently organized, is not exempt from the Missouri Sales Tax upon purchases made to or sales made by such organization.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

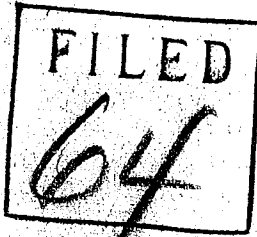
Very truly yours,

JOHN M. DALTON
Attorney General

LOTTERIES:

"Joker" is not a lottery:

Machine called "Joker" having all outward appearances and method of operation similar to a slot machine, except "Joker" has no means by which money can be inserted or obtained therefrom, and all a successful player can win are free games; said machine is not a gaming device adapted, devised or designed for the purpose of playing any game of chance for money or property within the meaning of Section 563.370, RSMo Cum. Supp. 1953. Keeping device, or inducing others to play same is not a violation of the section.



July 9, 1954

Honorable J. P. Morgan
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Morgan:

This department is in receipt of your recent request for an official opinion which reads, in part, as follows:

"I would appreciate an opinion of your office in answer to the questions herein set out based on the following facts. The Vinson Amusement Company of Chillicothe, Missouri, has for many years owned and operated many music and pin ball machines. They recently signed a contract to be distributors of a similar device which has all of the outward appearances of a slot machine, but has no place for coins to be inserted or discharged by the machine. The sole objective from my observation has been the construction of a machine that would be attractive from the standpoint of players and who could stand no chance at all other than the winning of free games, which with this device would be nothing other than pulling the handle one time for each game won. The name they have adopted in calling it the 'Joker' would be very appropriate.

* * * * *

"At Mr. Vinson's insistance I personally examined the machine and found that there was no opening for the insertion of coins or where money is commonly discharged from a slot machine. The control box along side of the same that is shown in the

Honorable J. P. Morgan:

picture apparently is to be on the back bar of the counter and one desiring to play the 'Joker' would pay the attendant who would run up as many free games as were paid for. This score would be indicated on the three openings on the front of the machine and it would take one game each time the handle was pulled one time. In the event one had a winner as it was known on slot machines the machine would run up additional free games. I might say that the inside of the apparatus does not have any reels whatever and the variation in the result of each pull of the handle is dependent upon which light goes on behind each and every insignia on the face of the different bells and plums shown.

* * * * *

"The question is:

- "1. Is a machine that has all outward appearances of being an illegal slot machine, but which has no means by which money can be inserted or obtained from the same and only registers free plays as on a pin ball machine, to be considered a gambling device and prohibited by the present laws of the State?"

Gaming was not a criminal offense at common law, and the devices used for those purposes were not unlawful per se. The general rule in this regard has been stated in C.J.S., Volume 38, page 142, to be:

"Gaming in and of itself, when not so public as to constitute a nuisance, was not a crime at common law, and is not unlawful per se. However, under statutes in the several states, gaming generally or of certain kinds is now an offense."

It is not a criminal offense to keep or operate gaming devices unless it has been declared such by statute. In Missouri, Section 563.370, RSMo Cumulative Supplement, 1953, provides that any of the gaming devices therein mentioned, kept, or operated is a criminal offense. Said Section reads as follows:

"Every person who shall set up or keep any table or gaming device commonly called A B C,

Honorable J. P. Morgan:

faro bank, E O, roulette, equality, keno, slot machine, stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property and shall induce, entice or permit any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played or by means of such table or gambling device or on the side or against the keeper thereof, shall, on conviction, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than five years, or by imprisonment in the county jail for a term not more than one year."

This section does not define "slot machine" or any of the other gaming devices therein referred to, but merely refers to each device by the name by which it is commonly called. The statute further recites that the keeping by any person of such devices "adapted, devised and designed for the purpose of playing any game of chance for money or property and shall induce, entice or permit any person to bet or play at or upon any such gaming table or gambling device, * * * shall, on conviction, be adjudged guilty of a felony, * * *." Since we have no statutory definition of a slot machine or of the manner of playing upon same, we must turn to the statutes of other States for same.

We here call attention to Paragraphs 1 and 2, Section 964, Oklahoma Statutes of 1941, defining the words "slot machine", and which reads as follows:

"First, Any machine, instrument, mechanism or device that operates or may be operated or played mechanically, electrically, automatically or manually, and which can be played or operated by any person by inserting in any manner into said machine, instrument, mechanism or device, a coin, chip, token, check, credit, money, representative of value, or a thing of value, and by which play or operation such person will stand to win or lose, whether by skill or chance, or by both, a thing of value; and

Honorable J. P. Morgan:

"Second: Any machine, instrument, mechanism or device that operates or may be played or operated mechanically, electrically, automatically, or manually, and which can be played or operated by any person by paying to or depositing with any person, or by depositing with or in any cache, receptacle, slot, or place a coin, chip, token, check, credit, money, representative of value, or a thing of value, and by which play or operation such person will stand to win or lose, whether by skill or chance, or by both, a thing of value."

It is believed that this definition is a good one and gives a clear description of a slot machine and the manner of operating or playing same. It is believed that said definition is in accord with Section 563.370, supra, as to the description of a slot machine and the manner in which this gaming device is operated. However, we wish to point out that, in our opinion, the slot machine referred to in the section quoted, is one which is capable of having money inserted into a slot for that purpose, and no other articles, such as those mentioned in the Oklahoma statute, being the representatives of money, are mentioned in the Missouri statute. The Oklahoma statute refers to the player winning something by chance or skill, or both, which is either money or a thing of value, whereas, Section 563.370, supra, makes no reference to skill. With these exceptions we feel that the definition of a slot machine is a proper one and is within the contemplation of the Missouri statute now under consideration.

Having noticed the characteristics of a slot machine given in the statutory definition, it remains for us to determine whether the machine described in the opinion request is a slot machine. If it is such a machine, then the keeping or operating of it would be a gambling device and in violation of the statute.

The machine called "Joker" has been described in the opinion request as having "all of the outward appearances of a slot machine, but has no place for coins to be inserted or discharged by the machine. The sole objective from my observation has been the construction of a machine that would be attractive from the standpoint of players and who could stand no chance at all other than the winning of free games, which with this device would be nothing other than pulling the handle one time for each game won." (Underscoring ours.)

Honorable J. P. Morgan:

It is obvious that the "Joker" player can take no chance of winning a prize of money or property within the meaning of Section 563.370, supra, unless the winning of free games could be classified as property. The case of State vs. One "Jack and Jill" Pinball Machine, 224 S.W. (2d) 854, is one in point, among other matters, holding that the privilege of playing free games was not property within the meaning of the Gambling Statute.

The Court had before it for determination the sole question as to whether or not, in the operation of the machine in question, when a player is entitled to free games upon the attainment of a certain score this makes the machine a gambling device under our statutes and is subject to confiscation.

The machine had been seized under a search warrant issued under authority of Section 4173, R.S. Mo. 1939 (now Section 546.380, RSMo Cum. Supp. 1953). Its destruction had been ordered by the trial court, since the machine had been found to be a gaming device prohibited by Section 4176, R.S. Mo. 1939 (now Section 563.370, RSMo Cum. Supp. 1953). The Court said, l.c. 860:

"Many other cases have been read but nearly all of them construe a statute different in phraseology from ours.

"Gambling, as judicially defined, has three necessary elements, (1) consideration or risk, (2) chance and (3) reward or prize. But the legislature has required the third element, when referable to a gambling device, to be 'money or property'. Does the player get property for his nickel? We think not. It is argued that he gets amusement. The vacuous mind that may momentarily be brightened by finding entertainment and amusement in watching a metal ball meander aimlessly over the surface of an inclined table and finally score by dropping from sight into an aperture therein, would be equally entertained by watching a certain species of scarabaeoid beetle aimlessly roll his putrid ball across the ground and into a hole where eventually it becomes sustenance for itself and young. Would not the entertainment and amusement in each instance be the same though five cents is paid to pull the plunger in the one and in the latter, the propulsion is by the beetle and its accomplishments are

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not emblazoned upon an electrically lighted scoreboard. The privilege of watching either would certainly not be property, under Section 4675, and we shall not dignify either by holding it to be 'a "thing" of value.'

"If a free game is property or a thing of value, what kind of value has it? Certainly it has no educational or intellectual value. How could watching a rolling ball bounce from peg to pin and then disappear, enrich the mind or broaden one's intellect? After its propulsion by the plunger, gravity moves the balls but that law of physics was discovered by Sir Isaac Newton and became common knowledge more than two centuries ago. Such information is not acquired by inserting a nickel in a pinball machine. From the beetle, one might learn some new fact relating to entomology but nothing from 'Jack and Jill.' If there is educational value in either, it preponderates in favor of the beetle. A free play certainly has not the educational value of a picture show, which in addition to entertainment and amusement, brings before the eyes and ears of millions, scenes and descriptions of faraway places, fine acting, historical facts and scientific matters that could be, by them, viewed or heard in no other way. Few modern developments have more educational value than the cinema.

"A free game has no physical value such as a game of golf, which by its pleasurable exercise, coupled with fresh air and sunshine develops the muscles, invigorates the body and creates a feeling of physical well being, thereby improving health and prolonging life. No such benefits appear here. To be allowed to do a useless thing free does not make that privilege property or a 'a "thing" of value' because one has previously paid for doing another such useless thing. There is a vast difference between cost and value. Permission to use a useless device is not property of 'a "thing" of value,' though the device used cost money to construct.

"Does the player receive anything of financial or economic value? Rather isn't this so-called

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recreation and amusement the antithesis of value? If one's time is worth anything, it is a loss instead of gain, a waste instead of reward. Hope of reward or gain, above the amount risked, is the lodestone of gambling. The fact that one has paid five cents for it does not conclusively fix that, or any other sum, as its value or any value at all.

"It may be argued that opportunity to play brings customers to the place of business where such devices are located. Assuming that it does, that 'pay off' does not go to the one who risks his nickel and takes the chance. If the only benefit that arises from the keeping of the device goes to the keeper by reason of other potential business transactions of the player, it could hardly be said that the third element of gambling was present. Rather, the first element of gambling is augmented.

"The legislature may decide that such a device should be suppressed because it is useless, causes a waste of valuable time and tends to encourage and develop the gambling instinct in the young, an argument that has been advanced, dicta, in many decisions. But until legislation to that effect is enacted, we must construe the statutes as we find them.

"The judgment should be reversed and the machine, so seized, returned to claimant. It is so ordered."

It is generally conceded that, before a device, or the operation of same, can be classified as a gambling device or game within the contemplation of the criminal statutes prohibiting the keeping or operation of said devices or games, three essential elements must co-exist at the time of the keeping of said game or device, named, one, consideration; two, chance, and three, prize.

Ordinarily, the consideration is the amount of money or other property paid for the privilege of playing, and the player by so doing plays the game, taking a chance to win a prize of money or property, which is usually of much greater value than the consideration paid.

Honorable J. P. Morgan:

From the facts given in the opinion request, a player pays a certain amount of money consideration in advance for the privilege of operating the device known as "Joker". The operation of same is accomplished when the player pulls the handle located upon the side of the machine. When this action is completed one game has been played. At such time the player takes a chance on winning free games, which games, as was pointed out by the Court in the "Jack and Jill" Pinball Machine case, were neither money nor property, hence, such games could not, and do not, constitute a prize, and prize is one of the essential elements to make the transaction a game of chance.

It further appears that the "Joker" was constructed for the purpose of affording innocent amusement to players and also as a stimulant to the business of the proprietor in whose place of business the machine is located. It is obvious that the "Joker" is not a slot machine or a gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property within the meaning of Section 563.370, supra. While it might be physically possible for players to gamble upon the machine, and by their actions make it a game of chance, yet this is not the purpose for which the machine was constructed nor intended to be operated, consequently, said machine is not a gambling device per se.

The statement of facts does not disclose that the machine referred to in the opinion request has ever been used for gambling purposes. In the event such facts should be shown, then, of course, in that particular instance the machine could, and should be classified as a gambling device, and the keeping or operation of same would be in violation of the statute.

In view of the foregoing and in answer to your inquiry, it is our thought that the machine described in your letter and called "Joker" is not a gambling device, and that the keeping and operation of same is not prohibited by Section 563.370, supra.

CONCLUSION

It is the opinion of this department that a machine referred to as "Joker" and having all the outward appearances of a device

Honorable J. P. Morgan:

commonly called a slot machine, but having no means by which money can be inserted into it, and no money or property of any kind obtained therefrom, and free games are all that a player can win when operating it, is not a gaming device adapted, devised or designed for the purpose of playing any game of chance for money or property, within the meaning of Section 563.370, RSMo Cum. Supp. 1953. The keeping, or inducing others to play or operate said machine is not a violation of said statute.

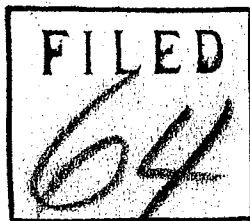
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC:irk

TAXATION: No Missouri inheritance tax due on insurance
INHERITANCE TAX: proceeds held in manner described.



August 9, 1954

M. E. Morris, Director
Department of Revenue
Jefferson City, Missouri

Attention: C. L. Gillilan
Inheritance Tax Division

Dear Sir:

Reference is made to your request for an official opinion of this department, which may be summarized in the following language:

Upon the death of an assured, a life insurance company, under an agreement with the assured, holds the proceeds in trust, paying the primary beneficiary interest thereon. Upon the death of the primary beneficiary or at some future stated time, the corpus of the trust estate is payable to a secondary beneficiary. The primary beneficiary has no power to withdraw any portion of the corpus of the trust estate nor to alter or modify the terms of the trust agreement with respect to the rights of the secondary beneficiary.

It is clear to be seen that, in the circumstances outlined, the proceeds of the life insurance policy retain their identity and characteristics as such. The lack of authority or power on the part of the primary beneficiary to in any manner control the subsequent disposition of the corpus of the trust estate clearly discloses that such identity and characteristics are not lost.

We therefore think that your problem is one of comparatively simple solution. We direct your attention to the provisions of

M. E. Morris, Director

Section 145.020 RSMo 1949, imposing the Missouri inheritance tax upon various types of transfers, but containing the following significant exemption:

* * * * *

"3. Nothing herein contained shall be construed as imposing a tax upon:

* * * * *

"(3) The proceeds of life insurance policies payable because of the death of the insured in trust or otherwise, to the beneficiaries other than the insured's estate."

In view of our determination that the corpus of the trust estate retains its characteristic as proceeds of a life insurance policy payable to named beneficiaries, we think the exemption contained in the section quoted is applicable.

CONCLUSION

In the premises we are of the opinion that no Missouri inheritance tax is due upon the payment to a secondary beneficiary of the proceeds of a life insurance policy payable upon the death of the assured under a trust agreement with the life insurance company to named beneficiaries.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB:vtl;sm

MOTOR VEHICLE SAFETY RESPONSIBILITY: Certified copies of records
CRIMINAL PROCEDURE: of Motor Vehicle Safety
EVIDENCE: Responsibility Unit have
not been made "evidence"
in criminal proceedings by virtue of statutory enactment.



September 9, 1954

M. E. Morris, Director
Department of Revenue
State of Missouri
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"The Safety Responsibility Unit which administers the Safety Responsibility Law is frequently confronted with those situations in which a person whose operation and registration privileges have been suspended refuses to surrender licenses evidencing such privileges. Section 303.370 makes such refusal a misdemeanor punishable by a fine of not more than \$500.00 or imprisonment not to exceed 30 days or both.

"Prosecuting Attorneys throughout this state are desirous of filing charges against these people, however, they are having great difficulty establishing a 'case', because many Judges are refusing to accept a certified copy of the Safety Responsibility Unit's record of suspension. The Judges point out that Section 490.180, Missouri Revised Statutes, 1949, which provides for the submittal of certified records does not include records of the Department of Revenue. It would be virtually impossible as a practical matter to have a representative from this Department personally appear and testify as to the authenticity of the original suspension records.

M. E. Morris, Director

"Prior to the adoption of the 1945 Constitution many of the activities now supervised by the Department of Revenue were under the Secretary of State or State Auditor. It would seem artificial to reason that by virtue of the creation of a new department that the records which were heretofore acceptable in a certified form are now no longer acceptable. Section 490.220 makes admissible all records and exemplifications of office books kept in any public office of the United States or a sister state as evidence if publicly attested to by the keeper of the records. It is evident by this section that practically all records of a sister state may be certified and various records of the State of Missouri cannot.

"In view of the foregoing facts, we respectfully request your opinion as to whether or not Section 490.180 can be interpreted to include the papers on file in the Department of Revenue in addition to the papers of the offices specifically enumerated therein."

Section 490.180 RSMo 1949, which you have referred to in your letter of inquiry, forms a portion of Chapter 490 RSMo 1949 denominated "Evidence" and reads as follows:

"Copies of all papers on file in the office of the secretary of state, state treasurer, state auditor and register of lands, or of any matter recorded in either of said offices, certified under the seal of the respective offices, shall be evidence in all courts of this state."

It will be observed that official records of the Department of Revenue have not been included within the scope of the statute.

Of course this is equally true with respect to the official records of a great many other departments of the State of Missouri. We have diligently searched other statutory enactments of the General Assembly of the State of Missouri and do not find that the official records of the Department of Revenue have been placed in the same category as those found in the offices of secretary of state, state treasurer, state auditor, and register of lands.

M. E. Morris, Director

It is an elementary rule of statutory construction that no occasion for construction arises with respect to a statute which is definite and unambiguous. Neither may the scope of the applicability of a statute be broadened beyond those persons or the particular subject matter to which, by its own terms, it relates. We are of the belief that the particular statute here under consideration falls within such a category, and that no construction thereof is necessary.

CONCLUSION

In the premises, we are of the opinion that certified copies of the official records of the Motor Vehicle Safety Responsibility Unit have not been accorded the status of "evidence" under the provisions of Section 490.180 RSMo 1949, or under any other statutory enactment.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

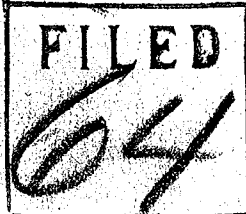
Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

**MOTOR VEHICLES:
REVOCATION OR SUSPENSION
OF DRIVER'S LICENSE:**

The Director of Revenue does not have authority to revoke a motor vehicle driver's license under Section 302.271, V.A.M.S. 1949, where such person has been convicted of careless driving only; or to suspend such driver's license under Section 302.281, V.A.M.S. 1949, where such person has pleaded guilty or has been convicted of careless and reckless driving.



September 22, 1954

Honorable M. E. Morris
Director, Department of Revenue
Jefferson City, Missouri

Dear Mr. Morris:

This will be the opinion you requested by letter asking if the Director of Revenue has authority to revoke an operator's or chauffeur's license under Subparagraph (7) of Section 302.271, V.A.M.S. 1949, where the licensee has been involved in an accident which resulted in the death of another person, if such licensee has been convicted of careless driving only, and whether the Director has the authority to suspend an operator's or chauffeur's license under Section 302.281, V.A.M.S. 1949, Subparagraph(1), where the licensee has pleaded guilty or has been convicted of careless and reckless driving.

Your letter reads as follows:

"We would appreciate having an opinion for our Driver's License Division concerning the following questions:

- "(1) Do we have authority to revoke an operator's or chauffeur's license under Section 302.271, sub-paragraph 7, where the person has been involved in an accident which resulted in the death of another person if he has been convicted on careless driving only?
- "(2) Do we have authority to suspend an operator's or chauffeur's license under Section 302.281, sub-paragraph 1, where

Hon. M. E. Morris

the person has pleaded guilty or been convicted of careless and reckless driving?"

Section 302.271, including Subsection (7) thereof, and Section 302.281, including Subsection (1) thereof, referred to in your request, read, respectively, in part, as follows:

"The director shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction of any of the following offenses, when such conviction has become final:

* * * * *

"(7) Any offenses involving the wanton and reckless operation of a motor vehicle which has resulted in the death of another."

Sec. 302.281

"1. The director shall suspend the license of an operator or chauffeur for a period of not to exceed one year, upon a showing by the records of the director or any public records that the operator or chauffeur:

"(1) Has caused the death or personal injury of another or serious property damage by his wanton and reckless operation of a motor vehicle;"

The St. Louis Court of Appeals in City of St. Louis vs. Mosier, 223 S.W.(2d) 117, held that a motor vehicle driver's license may be revoked only as provided by law. The court said, l.c. 119:

"While it is recognized that a driver's license amounts to no more than a personal privilege extended to the operator of a motor vehicle by the state or municipal authorities, such a license, once granted, is nevertheless not to be revoked arbitrarily, but only in the manner and on the grounds provided by law."

Hon. M. E. Morris

This means that such driver's license may only be revoked (or suspended) upon some lawful grounds provided by law, that is, for the doing of some act, or the failure to do some act which is prohibited from being done or required to be done, as the case may be, by statute. If the prohibited act be a criminal offense it must be described and defined by the statute in definite terms and language as a criminal offense.

It would not matter to what act a person would plead guilty or be convicted of as a basis of the suspension or revocation of his motor vehicle driver's license such conviction or plea would have no force or effect unless that act is defined by statute as a criminal offense. In setting forth what constitutes a criminal act a statute must set forth the facts constituting the crime with such certainty that the defendant may have notice of what he is called upon to meet and controvert and that the court, applying the law to the facts charged, may say that an offense has been committed. Nothing may be left to guess work or implication.

The Supreme Court of this state in State v. Bartley, 304 Mo. Rep. 58, l.c. 62, ruling on this question said:

"* * *Criminal statutes are to be construed strictly; liberally in favor of the defendant and strictly against the State, both as to the charge and the proof. No one is to be made subject to such statutes by implication. Where one class of persons is designated as subject to its penalties, all others not mentioned are exonerated. (State v. Jaeger, 63 Mo. 403, 409; State v. Gritzner, 134 Mo. 512, 527; State ex rel. v. State Board of Health, 288 Mo. 659, 671, 232 S.W. 1031; State v. McMahon, 234 Mo. 611, 137 S.W. 872.) Such statutes are not to be 'extended or enlarged by judicial construction so as to embrace offenses or persons not plainly written within their terms.' * * *"

Said Section 302.271 and Section 302.281, in providing for the exercise of the power of revocation or suspension, respectively, of a motor vehicle driver's license by the Director of Revenue, predicate such authority on the fact as stated in Subsection (7) of said Section 302.271, that the operator or chauffeur of such motor vehicle has been convicted of "any offense involving the wanton and reckless operation of a motor vehicle which has resulted in the death of another" or under Subsection (1) of said Section 302.281 that the operator or chauffeur of a motor vehicle "has caused the death or personal injury of another, or serious property

Hon. M. E. Morris

damage by his wanton and reckless operation of a motor vehicle."

Neither the "wanton and reckless operation of a motor vehicle, which has resulted in the death of another" as set forth in Subsection(7) of said Section 302.271, nor the "wanton and reckless operation of a motor vehicle" as set forth in Subsection (1) of said Section 302.281, are defined or made criminal offenses by the statutes of this state. The power to define and pronounce any act upon the part of any person to be a criminal offense is vested solely in the legislative branch of the state government. The Legislature of this state has not given the Director of Revenue any authority under the provisions of said sections to determine whether the operator or chauffeur of a motor vehicle was engaged in "the wanton and reckless operation of a motor vehicle which has resulted in the death of another" under said section 302.271, or to determine whether such operator or chauffeur of such vehicle was engaged in "wanton and reckless operation of a motor vehicle" under the provisions of said Section 302.281. A conviction of the operator or chauffeur of a motor vehicle of wanton or reckless operation of a motor vehicle under said section, or a conviction for the wanton and reckless operation of a motor vehicle under Section 302.281, being acts not made criminal offenses by statute, would have no force or effect and would not, and do not, constitute lawful grounds for the suspension or the revocation of the motor vehicle driving license of such operator or chauffeur under any of the terms of the said Sections 302.271 or 302.281, V.A.M.S. 1949. If there is no crime committed by, or charged against, such operator or chauffeur of a motor vehicle there cannot be a valid conviction for such acts.

CONCLUSION

It is, therefore, considering the premises, the opinion of this office that:

1) Under the terms of Subparagraph (7) of Section 302.271, of the Revised Statutes of this state, 1949, the Director of Revenue does not have authority to revoke the driver's license of an operator or chauffeur of a motor vehicle where such person has been convicted of careless driving only;

2) That under the terms of Subparagraph (1) of Section 302.281 of the Revised Statutes of this state, 1949, the Director of Revenue is not authorized to suspend the driver's license of an operator or chauffeur of a motor vehicle where

Hon. M. E. Morris

such person has pleaded guilty to or has been convicted of careless and reckless driving.

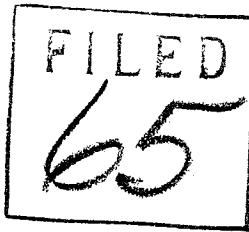
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. George W. Crowley.

Very truly yours,

JOHN M. DALTON
Attorney General

GWC:mw

SPECIAL ROAD DISTRICTS: Last board of trustees of eight-mile special road district winds up affairs of district upon dissolution.



May 25, 1954

Honorable Charles E. Murrell, Jr.
Prosecuting Attorney
Knox County
Edina, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request is as follows:

"I would like to have an opinion from your office concerning the road equipment, personal property and debts of a Special Road District in answer to the following questions:

(1) What disposition and the authority therefor, is to be made of the road machinery, equipment and personal property of a Special Road District upon dissolution of the district?

(2) What disposition is made of the debts of a Special Road District upon dissolution?

(3) What is the procedure to be followed for payment of the debts of a Special Road District upon dissolution?

"The debts referred to are outstanding debts for supplies and equipment and the district does not have any bonded indebtedness."

You have informed us that the special road district in question was organized under Section 233.010 - 233.165, RSMo 1949. Section 233.160 provides for the dissolution of such special road districts. That section reads as follows:

Honorable Charles E. Murrell, Jr.

"1. If any district shall have adopted the provisions of sections 233.010 to 233.165 the question may be resubmitted after the expiration of four years upon the petition of fifty resident taxpayers of said district at the next general election, or at a special election to be held for that purpose at such time as the county court may order.

"2. The county court shall give notice of such election and of such submission by publishing the same in some newspaper published in the county, such notice to be published for two consecutive weeks, the last insertion to be within five days next before such election; and such other notice may be given as the court may think proper.

"3. The county court shall have the ballots for such election printed and shall have printed on such ballots 'For the disorganization of the special road district,' 'Against the disorganization of the special road district,' with the direction 'Erase the clause you do not favor.' If a majority of the votes upon such proposition be cast against it, said district shall be disincorporated and the operation of the law shall cease in said district. In all other respect said election, and the results thereof, shall be governed by the provisions of sections 233.010 to 233.165."

Section 233.165 provides for the levy of a tax to pay the bonded indebtedness of such dissolved road district. Otherwise, the statutes are silent as to the procedure to be followed upon dissolution. The Legislature has provided the procedure to be followed upon dissolution of a special benefit assessment road district (Secs. 233.290 - 233.315, RSMo 1949), but has not seen fit to enact similar legislation for a district such as here involved.

In view of the absence of any statutory provision, it is our opinion that it is the duty of the last board of trustees of the district to wind up the affairs of the district in such manner as will protect the interest of all concerned.

Honorable Charles E. Murrell, Jr.

As for the disposition of the property, Section 233.090, RSMo 1949, provides:

"Said board shall sell any property of such district, on such terms as it may deem proper, when same can no longer be profitably used for road work."

In view of the authority conferred upon the board of trustees by this section, it is our opinion that upon dissolution of the district the board would have authority to sell the machinery and property belonging to the district and to use the proceeds in payment of any outstanding obligation to the district. Should the board have machinery and other personal property which cannot be sold, it is our opinion that such property and machinery should, upon winding up of the dissolution, be turned over to the county court.

As for the disposition of the debts of the road district other than bonded indebtedness, we presume that the indebtedness to which you refer has been legally incurred in accordance with Section 233.135, RSMo 1949. That section provides:

"Such board may issue warrants on the treasurer of the board in payment of the expenses and obligations which the board are authorized to incur in behalf of such special road districts and such warrants may be issued in anticipation of the income and revenue provided for the year for which the debt or obligation for which the warrant is issued was incurred; but such districts or such board on behalf thereof shall not purpose to an amount exceeding in any one year the income and revenue provided for such year; provided, however, that this shall not prevent the incurring of indebtedness under bond issue as is or may be provided by law."

Any indebtedness which is within the limits of the anticipated revenue for the year in which the indebtedness was incurred is a valid obligation of the district and should, of course, be paid. Should the indebtedness not have been incurred in conformance with Section 233.135 and Section 26(a) of Article VI of the Constitution of Missouri, 1945, such indebtedness is void and not a binding obligation of the district. *Barnard and Co. v. Knox County*, 105 Mo. 382.

Honorable Charles E. Murrell, Jr.

We are of the opinion that such debts should be paid in the usual manner by the treasurer of the last board of trustees. For such payment he may use any funds which come into his hands from sale of the property of the district, as above discussed. Should the district have voted the special tax authorized by Section 137.565, RSMo 1949, for the year of dissolution, that tax should be levied and collected for such year and the proceeds turned over to the district treasurer, inasmuch as the proceeds of such tax would have been taken into consideration in estimating the revenue of the district which was the basis for the incurring of the obligations. The county court should also turn over to the treasurer any funds to which the district might be entitled under Section 233.125, RSMo 1949.

Upon the payment of the outstanding obligations, any balance in the hands of the district treasurer should be paid into the county treasury and a settlement made with the county court in accordance with Section 233.150, RSMo 1949.

CONCLUSION

Therefore, it is the opinion of this office that upon the dissolution of a special road district organized under the provisions of Sections 233.010 - 233.165, RSMo 1949, the last board of trustees of such district should proceed to wind up its affairs and for such purpose may sell road machinery, equipment and personal property of the district and apply the proceeds of such sale in payment of outstanding obligations of the district. We are further of the opinion that outstanding obligations of the district which have been legally incurred should be paid by the treasurer of such road district in the usual manner.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

INCOME TAX:
INTANGIBLE PERSONAL PROPERTY TAX:
ST. LOUIS HOUSING AUTHORITY:

- (1) Interest derived from bonds of St. Louis Housing Authority is subject to Missouri Income Tax.
- (2) The bonds of the St. Louis Housing Authority are subject to the Missouri Intangible Personal Property Tax.



June 8, 1954

Honorable Samuel B. Murphy
Member, Missouri House of Representatives
1202 N. Geyer Road
Kirkwood 22, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"I would appreciate it if you would furnish me, as soon as possible, with an opinion as to whether or not bonds issued by the St. Louis Housing Authority are subject to the Missouri intangible tax.

"I would also like to be advised as to whether the income from such bonds is subject to Missouri income tax.

"My understanding is that such bonds are guaranteed in some way by the United States Government through the Federal Housing Administration."

We wish to say at the outset that the matter referred to in the last paragraph of your letter of inquiry has no application, in our opinion, to the taxability of the interest received upon the bonds referred to in your letter.

We have examined the provisions of Chapter 99, RSMo 1949, particularly Sections 99.010 to 99.230, inclusive. We do not find that any specific statutory exemption has been

Honorable Samuel B. Murphy

granted from the payment of Missouri Income Tax with respect to interest received upon bonds issued by a Housing Authority created pursuant to the provisions of the statutes mentioned.

We have given consideration to Subsection (5) of Section 143.150, RSMo 1949, which reads as follows:

"The following income shall be exempt from the provisions of this chapter:

* * *

"(5) Interest upon the obligations of this state or of any political subdivision thereof, or upon the obligations of the United States or its possessions; * * *"

We feel that consideration should be given the quoted portion of this statute by virtue of the possibility of some contention being made that a Housing Authority is a "political subdivision." The term "political subdivision" has been defined in Section 15, Article X of the Constitution of Missouri in the following language:

"The term 'other political subdivision,' as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."

The constitutional provision quoted forms a portion of Article X relating to "taxation" and we therefore think it persuasive in arriving at the proper definition of the term "political subdivision" as used in statutes relating to that subject matter. Under opinions dated August 9, 1946, and May 1, 1953, delivered to G. H. Bates and M. E. Morris, respectively, this office has held that the St. Louis Housing Authority is not a "political subdivision" of the state within the meaning of the Sales Tax Law. We follow these holdings in the present opinion.

From the foregoing we reach the conclusion that interest received upon the bonds of a Housing Authority is not interest received upon an obligation of a political subdivision of the state of Missouri.

Honorable Samuel B. Murphy

Further examination of the municipal housing act does not indicate that exemption has been extended to the income derived from such bonds with respect to the Missouri intangible personal property tax. In this regard we direct your attention to Section 146.010, RSMo 1953 Cumulative Supplement reading in part as follows:

"1. 'Intangible personal property' means moneys on deposit; bonds, except those which under the constitution or laws of the United States may not be made the subject of a property tax by the state of Missouri; certificates of indebtedness, other than capital notes issued by banks or trust companies; notes; debentures; annuities (except all annuity and pension payments paid to or received by any beneficiary under any law of the United States of America whereby funds are deducted from earnings of federal employees to be paid into a pension or annuity fund created and administered under a law of the United States of America, except also all annuity and pension payments paid to or received by any beneficiary under any law of the state of Missouri whereby funds are deducted from earnings of employees of the state of Missouri, or any political subdivision of the state of Missouri, to be paid into a pension or annuity fund created and administered under a law of the state of Missouri); accounts receivable; conditional sales contracts, which have incorporated therein promises to pay; and real estate and chattel mortgages." (Emphasis ours.)

Examination of the federal and state constitutions does not disclose any inhibition upon the power of the state of Missouri to subject such bonds to a property tax.

CONCLUSION

In the premises we are of the opinion that the income derived from bonds of the St. Louis Housing Authority is

Honorable Samuel B. Murphy

subject to Missouri income tax.

We are further of the opinion that the bonds of the St. Louis Housing Authority are subject to the Missouri intangible personal property tax, such taxes to be measured upon the yield derived therefrom.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

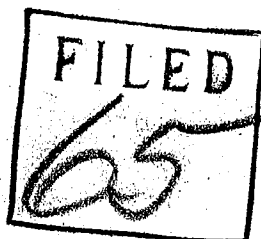
JOHN M. DALTON
Attorney General

Enclosures- G. H. Bates - 8-9-46
M. E. Morris- 5-1-53

WFB:vlw

POLICE:
KANSAS CITY POLICE:
RESIDENCE:
QUALIFICATIONS FOR OFFICE:
OFFICERS:

Police commissioners or policemen of the City of Kansas City must reside within the city and residence within an area which the voters have voted to annex but which annexation has not become effective will not satisfy this requirement.



December 27, 1954

Honorable Harry F. Murphy
Secretary
Board of Police Commissioners
Police Headquarters
Kansas City 6, Missouri

Dear Sir:

This is in answer to your request for an official opinion of this office wherein you ask:

"Section 84.350, Revised Statutes 1949, which applies to qualifications of police commissioners and Section 84.570 as applies to police personnel set out the residential requirements. At the election held in Kansas City on November 2, 1954, certain areas were annexed by Kansas City. The annexation, however, not to become effective until 1956.

"Will you please give us an opinion as to whether a commissioner or an employee can at this time move into the annexed area and retain his position."

As to police commissioners, Section 84.350 RSMo 1949 sets forth the following requirements for qualification:

"The said commissioners shall be citizens of the state of Missouri and shall have been residents of the respective cities in which they are appointed to serve for a period of four years next preceding their appointment;"

Honorable Harry F. Murphy

As to policemen or officers of police, Section 84.570 RSMo 1949 sets forth the following qualifications:

"No person shall be appointed policeman or officer of police who shall have been convicted of any offense, the punishment of which may be confinement in the state penitentiary; nor shall any person be appointed who is not proven to be of good character, or who is not proven to be a bona fide citizen and resident of such city for a period of at least one year and a citizen of the United States, or who cannot read and write the English language and who does not possess ordinary physical strength and courage, nor shall any person be originally appointed to said police force who is less than twenty-one years of age."

Thus, the statute requires that in order to qualify as a member of the board of police commissioners, the commissioners "shall have been residents of the respective cities in which they are appointed to serve for a period of four years next preceding their appointment," and as to policemen and officers of police, the statute provides that no person shall be appointed to such position "who is not proven to be a bona fide citizen and resident of such city for a period of at least one year." A search of the authorities reveals no case exactly in point on this matter; however, in the case of *State ex rel. Johnson v. Donworth*, 127 Mo. App., 377, the St. Louis Court of Appeals held that one who was elected an alderman of a city of the fourth class and later moved out of the ward which he was elected to represent thereby lost his qualifications for such office and was subject to ouster therefrom. In this case, the statute required that in order to be eligible to the office of alderman, the candidate must be a resident of the ward from which he is elected. In reaching this conclusion, the St. Louis Court of Appeals said, l.c. 380:

"No doubt if a person was elected alderman without those qualifications, he might be ousted from office; and thus far the contention of the defendant's counsel, that the section prescribes who shall be eligible for election, is sound. But the section

Honorable Harry F. Murphy

goes further, and, in our opinion, requires a continuance of those qualifications to entitle one elected alderman to remain in office. If an incumbent should cease to be a citizen of the United States, or a resident of the city, it is conceded he would lose his right to hold the office. The requirement that he shall be a resident of the ward from which he is elected is no less imperative, and we think change of residence to another ward disqualifies him to represent the ward by which he was chosen and forfeits his right to the office."

This case was cited with approval by the Supreme Court of Missouri En Banc in the case of State ex rel. City of Republic v. Smith, 139 SW2d 929, 345 Mo. 1158. In this connection, see also the decision of the Kansas City Court of Appeals in State ex rel. Lowe v. Banta, 71 Mo. App. 32. The general rule as to the requirement of residency is stated in 42 Am. Jur. 916, Public Officers, Section 46, as: "Where residence is made a condition of eligibility to office it should exist at the time and for the period required by law."

In this particular case, it is contemplated that one or more of the commissioners or policemen may wish to move into an area the annexation of which has been approved by the voters but that such area will not become finally annexed until some date in the future. It would seem that where the procedure for annexation of this territory has not been completed, the territory must be considered as being outside of the limits of the city in that residence therein would not qualify one for membership in the police force under the provisions of the statutes quoted above.

A somewhat similar situation was before the Supreme Court of Kansas in the case of State ex rel. Conderman v. Jones, 219 Pac. 2d 706, 169 Kan. 521, where the statute required that before one could qualify for mayor of a city, he must live in such city for a period of two years prior to his election. The successful candidate had moved into a residence in a suburban area outside of the boundaries of the city for a period of time within the two years before his election, and the Supreme Court, with apparent reluctance, held that such residence in the suburbs outside the limits of the city would disqualify the successful candidate from holding office.

Honorable Harry F. Murphy

In view of the fact that annexation ordinance No. 15950 provides that the annexation authorized therein shall not take effect until January 1, 1959; that ordinance No. 15951 provides that the annexation authorized therein shall not take effect until January 1, 1958; and that ordinance No. 16136 provides that the annexation authorized therein shall not take effect until January 1, 1957, it is the conclusion of this office that if a commissioner or an employee should move his residence into the area covered by any one of these ordinances, he would thereby become disqualified to retain his position as commissioner or as policeman or officer of police of Kansas City, Missouri.

The above conclusion is reached on the assumption that it would be the intention of the person involved to move his residence into such area. If there should be any question of intent to move his residence, then such problem would have to be determined upon the fact situation of the individual case.

CONCLUSION

On the basis of the foregoing, it is the conclusion of this office that if a commissioner or policeman or an officer of police moves into an area which the voters have voted to annex but the annexation of which has not been completed, he would thereby become disqualified to retain his position.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

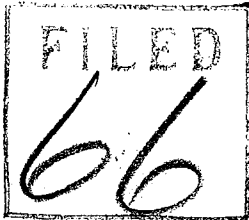
Very truly yours,

John M. Dalton
Attorney General

FLH:sm,lw

APPROPRIATION:
CONSTITUTION:
GENERAL ASSEMBLY:
ROADS:
TAXATION:

The General Assembly can create a special fund for the purpose of financing local roads, but such special fund would be subject to dissolution, and appropriation for other purposes, by succeeding General Assemblies.



February 1, 1954

Honorable William R. Nelson
Director of Research
Committee on Legislative Research
State Capitol
Jefferson City, Missouri

Dear Sir:

By letter of January 7th, 1954, you requested an official opinion as follows:

"The Joint Local Roads Study Commission, which was created by the Sixty-seventh General Assembly under the terms of Senate Concurrent Resolution No. 8, among other matters is considering the problems connected with the financing of local roads.

"The commission has instructed me to request your opinion on the following question:

"Under present constitutional provisions can the General Assembly create a special fund such as the county aid road fund for the purpose of financing local roads and provide by general law that all sales tax money (less a percentage for the support of free public schools) which is collected on the sale of specified automotive products be deposited in such a fund subject to appropriation by succeeding general assemblies only for the support of local roads? * * *"

Honorable William R. Nelson

You stated in your letter that it is proposed that sales tax from "specified automotive products" be placed into a special fund to aid local roads. You are cautioned that certain types of taxes on automobiles are restricted by the Constitution to use by the State Highway Commission for its purposes.

"Sec. 30. Source and application of highway funds.--For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers, and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes,) less the cost, (1) of collection thereof, (2) of maintaining the commission, (3) of maintaining the highway department, (4) of any workmen's compensation, (5) of the share of the highway department in any retirement program for state employees as may be provided by law, (6) and of administering and enforcing any state motor vehicle laws or traffic regulations, shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other:
* * *."

You are further cautioned that a certain percentage of the state revenue must be used for the support of public schools. This is required by Article IX, Section 3(b), Constitution of Missouri, 1945:

"In event the public school fund provided and set apart by law for the support of free public schools, shall be insufficient to sustain free schools at least eight months in every year in each school district of the state, the general assembly may provide for such

Honorable William R. Nelson

deficiency; but in no case shall there be set apart less than twenty-five per cent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools."

Your opinion request raises two questions. They are, (1), can the General Assembly by general law create a special fund, and (2), can succeeding general assemblies appropriate from that special fund for purposes other than for which the fund was created.

Article III, Section 36, Constitution of Missouri, 1945, requires that all revenue be paid into the treasury:

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. All appropriations of money by successive general assemblies shall be made in the following order:

"First: For payment of sinking fund and interest on outstanding obligations of the state.

"Second: For the purpose of public education.

"Third: For the payment of the cost of assessing and collecting the revenue.

"Fourth: For the payment of the civil lists.

"Fifth: For the support of eleemosynary and other state institutions.

"Sixth: For public health and public welfare.

"Seventh: For all other state purposes.

"Eighth: For the expense of the general assembly."

Honorable William R. Nelson

A situation similar to the one at hand was presented in State ex rel. Fath v. Henderson, 160 Mo. 190, 60 S.W. 1093. The General Assembly in 1899 passed an inheritance tax law, which provided in part, as follows:

"Sec. 4. The moneys received by the State Treasurer under the provisions of this act shall be deposited in the State Treasury to the credit of the fund now existing in the State Treasury and known as the 'State Seminary Moneys,' for the maintenance, support, and better equipment of the buildings, apparatus, books, instruction, etc., of the University of the State of Missouri, * * *."

The relators objected to collection of this tax on constitutional grounds. One of the contentions was that the creation of a special fund by the Legislature was prohibited by Article IV, Section 43, Constitution of Missouri, 1875. This provision is substantially identical, for our purposes, to Article III, Section 36 quoted above. The Supreme Court of Missouri stated that the General Assembly was not prohibited from creating a special fund, saying l.c. 209:

"* * * The argument of relator is predicated on section 43 of article 4 of the Constitution, namely, that 'all revenue collected and moneys received by the State from any source whatsoever shall go into the Treasury, and the General Assembly shall have no power to divert the same or permit the money to be drawn from the Treasury except in pursuance of regular appropriations made by law,' which is followed by the provision directing the order in which the Legislature shall pass appropriation bills.

"From these words counsel deduce the proposition 'that all revenue collected and moneys received by the State from every source shall go in the first instance into one common or general fund, unfettered, unpledged and unappropriated,' and that these words

Honorable William R. Nelson

necessarily prohibit the creation of any special funds in the Treasury to be supplied out of revenue provided by the General Assembly.

"Other words must be read into the article to justify such an interpretation, to-wit, 'one general fund.' If such was the intention of the framers of the Constitution they were singularly unhappy in expressing themselves, an imputation which we are unwilling to cast upon that body, especially when they were preparing an instrument so solemn and important in its nature." (Emphasis theirs).

Having determined that the General Assembly can create a special fund, it is now necessary to determine whether that action is binding on succeeding General Assemblies, and whether succeeding Assemblies can appropriate funds that have been placed into the special fund for other purposes. It is too clear to warrant discussion that if the General Assembly has the power to pass general legislation, it has the same power to repeal that legislation. Therefore, a succeeding Legislature could repeal the legislation setting up the special fund. This problem was also discussed in *State ex rel. v. Henderson*, supra, 1.c. 214:

"The method of the assessment or the process by which it is to be collected is not challenged by relators, but the great objection, as already seen, is to the fact that it creates a special fund, in the Treasury, instead of placing it in the general or common fund. Let it be freely admitted that one General Assembly can not tie the hands of its successor, and that although this tax is set apart into a special fund, it still belongs to the State and may be appropriated to another and different use, * * *." (Emphasis ours).

CONCLUSION

Honorable William R. Nelson

It is, therefore, the opinion of this office that the General Assembly can create a special fund for the purpose of financing local roads, but that such special fund would be subject to dissolution, and appropriation for other purposes by succeeding General Assemblies.

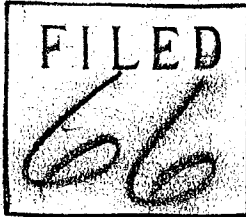
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON
Attorney General

PMcG:vlw

STATE PURCHASING AGENT: Purchasing agent does not have the duty to let contracts for the erection of state educational buildings.



March 17, 1954

Honorable Edgar C. Nelson
State Purchasing Agent
State Capitol Building
Jefferson City, Missouri

Dear Mr. Nelson:

Reference is made to your request for an official opinion of this office which request reads, in part, as follows:

"Please advise me as to whether the Division of Procurement is charged with the responsibility of letting contracts for the erection of state educational buildings. * * *"

You inquire whether the Division of Procurement is charged with the responsibility of letting contracts for the "erection" of state educational buildings. The provision relating to the Division of Procurement are contained in Chapter 34, RSMo, 1949, and we refer briefly thereto.

Section 34.030, relating to the duties of the Purchasing Agent provides that said officer shall purchase all supplies for all departments of the state except as otherwise provided and that he shall negotiate all leases and purchase all lands except for such departments as derive their power to acquire lands from the Constitution. Said section more fully provides:

"The purchasing agent shall purchase all supplies for all departments of the state, except as in this chapter otherwise provided. The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state."

Honorable Edgard C. Nelson

Section 34.010 defines the terms "suppliers" "contractual services" and "department" as follows:

"1. The term 'supplies' used in this chapter shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this chapter otherwise provided.

"2. 'Contractual services' shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service.

"3. The term 'department' as used in this chapter shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the state, except the legislative and judicial departments."

As we view the above noted sections we do not believe that the duty or responsibility for the letting of contracts for the "erection" of state educational buildings devolves upon the state purchasing agent inasmuch as the term "contractual services" has been limited to telephone, telegraph, postal services, etc., as above enumerated, would preclude under the doctrine "expressio unius est exclusio alterius," services under a contract for the erection of buildings. We have likewise examined the statutes relating to state educational institutions and find nothing therein which would require the state purchasing agent to negotiate and let contracts for the erection of buildings.

You further inquire as to what buildings fall within the jurisdiction of the superintendent of public buildings (we assume as indicated by the first question above noted that you inquire in regard to erection). In this regard we respectfully direct your attention to Section 27.040, RSMo. 1949, which provides that the Attorney General "shall give his opinion in writing to * * * the head of any state department * * * upon any question of law relative to their respective offices or the discharge of their duties." Since we have above noted that the state purchasing agent has no duties in regard to the erection of state educational buildings, and since the authority and duties of the Director of Public Buildings would not involve the duties of your office we will, at this writing, decline to answer the latter question.

Honorable Edgar C. Nelson

CONCLUSION

Therefore, it is the opinion of this office that the Division of Procurement is not charged with the responsibility of negotiating and letting contracts for the erection of state educational buildings.

This opinion, which I hereby approve, was written by my assistant, Mr. Donal D. Guffey.

Yours very truly,

JOHN M. DALTON
Attorney General

DDG:mw

ELECTIONS: The name of Earl White should not appear on
CANDIDATES: the ballot in the forthcoming General Elec-
POLITICAL PARTIES: tion as a candidate for the office of Repre-
sentative to the General Assembly from the
Seventeenth District.

September 7, 1954



Board of Election Commissioners
For the City of St. Louis
208 South Twelfth Boulevard
St. Louis 2, Missouri

Attention: Honorable Daniel J. Nack, Acting Chairman.

Gentlemen:

By letter dated August 25, 1954, you requested an opinion of this office in the following manner:

"This Board has been in communication with a group of individuals who first identified themselves as the 'FEPC Committee of Missouri', and at a later date reidentified themselves as the 'Peoples Peace Party of Missouri.'

"May I respectfully call your attention to Chapter 120, Nomination and Political Committees Revised Statutes of Missouri, 1953-54, and also to Sections 120.190 and 120.160, and any other sections that may apply.

"This group above described has requested, in the first instance, the name of Earl White be placed on the ballot as a candidate for State Representative from the Seventeenth District by the 'FEPC Party of Missouri', and in the second instance they have requested that the name of Earl White be placed on the ballot as a candidate for the Office of State Representative 17th District for the 'Peoples Peace Party of Missouri'.

Board of Election Commissioners

"It seems significant from the material submitted to this Board that Mr. Earl White has not complied with the law concerning his candidacy and the necessary procedure relative thereto.

"I am enclosing all the papers and statements that we have received in this matter to date.

"Please advise this Board at your earliest convenience as to our legal position in the matter."

Neither the "FEPC Party of Missouri" nor the "Peoples Peace Party of Missouri" are established political parties within the meaning of Section 120.140, RSMo Cumulative Supplement, 1953. Said section reads:

"1. The term 'political party' as used in sections 120.140 to 120.230 shall mean any 'established political party' as hereinafter defined and shall also mean any political group which shall hereafter undertake to form an established political party provided for in sections 120.140 to 120.230; provided, that no political organization or group shall be qualified as a political party, or given a place on a ballot, which organization or group advocates the overthrow by violence of the established constitutional form of government of the United States or the state of Missouri.

"2. An 'established political party' is hereby declared to be a political party which, as to the state, at the last general election for state and county officers, polled for its candidate for governor more than two per cent of the entire vote cast for governor in the state; and, as to any district or political subdivision of the state, a political party which polled more than two per cent of the entire vote cast in such district or political subdivision at such election.

Board of Election Commissioners

"3. A political party, which in any congressional district, senatorial district, county, township, school district, municipality or other district or political subdivision of the state, polled more than two per cent of the entire vote cast within such congressional district, senatorial district, county, township, school district, municipality or other district or political subdivision of the state, where such district or political subdivision, as the case may be, has voted as a unit for the election of officers to serve the respective territorial area of such district or political subdivision, is hereby declared to be an 'established political party' within the meaning of sections 120.140 to 120.230 as to such district or political subdivision."

Nor are said groups new political parties within the meaning of Section 120.160, RSMo Cumulative Supplement, 1953, for failure to comply with the provisions of said section, which reads:

"1. Any group of persons hereafter desiring to form a new political party throughout the state, or in any political subdivision greater than a county and less than the state, shall file with the secretary of state a petition, as hereinafter provided, and any group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any group of persons hereafter desiring to form a new political party in any political subdivision less than a county shall file such petition with the clerk or board of election commissioners of such political subdivision, as the case may be. Any such petition for the formation of a new political party throughout the state, or in any district or political subdivision as the case may be, shall declare as concisely as may be the intention of the signers thereof to form a new political party in the state, district or political subdivision; shall state in not more than five words the name of the

Board of Election Commissioners

proposed political party; shall contain a complete list of candidates of all offices to be filled in the state or district or political subdivision, as the case may be, at the next ensuing election then to be held; and, if the new political party shall be formed for the entire state, shall be signed by a number of qualified voters in each of the several congressional districts which shall equal one percent of the total number of votes cast in such district for governor at the next preceding gubernatorial election, or by a number of qualified voters in each of one half of the several congressional districts which shall equal two per cent of the total number of votes cast in such district for governor at the next preceding gubernatorial election. If the new political party shall be formed for any district or political subdivision less than the entire state, the petition shall be signed by qualified voters equaling in number not less than two per cent of the number of voters who voted at the next preceding general election in the district or political subdivision in which such district or political subdivision, voted as a unit for the election of officers to serve its respective territorial area.

"2. The filing of such petition shall constitute the political group a new political party, for the purpose only of placing upon the ballot at the next ensuing election the list of party candidates for offices to be voted for throughout the state, or for offices to be voted for in the district or political subdivision less than the state, as the case may be, under the name of, and as candidates of such new political party. If, at the ensuing election, any candidate or candidates of the new political party shall receive more than two per cent of all votes cast at such election in the state, or two per cent of the total vote cast in any district or political subdivision of the state, as the case may be, then such new political party shall become an established political party

Board of Election Commissioners

within the state or within the district or political subdivision, as the case may be, under the provisions of the laws regulating the nominations of established political parties at state primary elections as now, or hereafter may be in force.

"3. Any such petition shall be filed at the same time and shall be subject to the same requirements and provisions that are hereinafter contained in regard to the nomination of any other candidate or candidates by petition."

Since the "FEPC Party of Missouri" and the "Peoples Peace Party of Missouri" have not complied with the above statutory requirements they have no place on the ballot, and no person is entitled to appear on the ballot at the forthcoming General Election as a nominee of such "Parties". Apparently, there has been no attempt by White to file as an independent candidate under the provisions of Sections 120.180 and 120.190, RSMo Cumulative Supplement, 1953. Those sections read:

"Nominations of independent candidates (not candidates of any political party) for any office to be filled by the voters of the state at large may also be made by nomination petitions signed in the aggregate for each candidate by a number of qualified voters in each of the several congressional districts which shall equal one per cent of the total number of votes cast in such district for governor at the next preceding gubernatorial election, or by a number of qualified voters in each of one half of the several congressional districts which shall equal two per cent of the total number of votes cast in such district for governor at the next preceding gubernatorial election. Nominations for independent candidates for public office within any district or political subdivision less than the state, may be made by nomination petitions signed in the aggregate, for each candidate by qualified voters of the district or political subdivision,

Board of Election Commissioners

equaling not less than two per cent of the number of persons who voted at the next preceding general election in such district or political subdivision in which the district or political subdivision voted as a unit for the election of officers to serve its respective territorial area. Each voter signing a nominating petition shall add to his signature his place of residence, and each voter may subscribe to one nomination for any office to be filled, and no more."

"1. All petitions for nomination under sections 120,140 to 120,230 for candidate for public office in this state shall, in addition to other requirements provided by law, be as follows: The petition shall consist of sheets of uniform size and each sheet shall contain, above the place for signature, an appropriate heading, giving the information as to the name of the candidate or candidates in whose behalf the petition is signed; the office; the party; place of residence; and the heading of each sheet shall be the same. Such petition shall be signed by the qualified voters in their own proper persons only, and opposite the signature of each signer his residence address shall be written by the voter in person. If the signer is a resident of a city having a population of over ten thousand population by the then last preceding federal census, the street and number of such residence shall also be given. No signature shall be valid or be counted in considering the validity or sufficiency of such petition unless the requirements of this section are complied with. At the bottom of each sheet of the petition shall be added a statement, signed by a qualified voter of the political division for which the candidate or candidates shall be nominated, stating his residence address and certifying that the signatures on that sheet of said petition were signed in his presence and are genuine, and that to the best of his knowledge the persons so signing were at the time of signing the petition qualified voters of the political division for which the candidate or candidates shall be nominated, and that their respective

Board of Election Commissioners

residences are correctly stated thereon. Such statement shall be sworn to before some officer of the county in which the person making the statement resides, authorized to administer oaths therein. Such sheets before being presented to the secretary of state or filed with the proper officer of the district or political subdivision, as the case may be, shall be neatly fastened together in book form, by placing the sheets in a pile, fastening them together at one edge in a secure and suitable manner, and the sheets then shall be numbered consecutively. The sheets shall not be fastened together by pasting them together end to end, so as to form a continuous strip or roll. The petition when presented for filing, shall not be withdrawn, altered or added to, and no signature shall be revoked except by revocation in writing presented and filed with the officer or officers with whom the petition is required to be filed before the presentment for filing of the petition. Whoever in making the sworn statement required by this section shall knowingly and willfully swear falsely shall be deemed guilty of perjury, and upon conviction, shall be punished accordingly. Whoever shall forge any name of a signer upon a petition, shall be deemed guilty of forgery in the third degree and upon conviction thereof, be punished accordingly.

"2. The words 'political division for which the candidate is nominated' shall mean the largest political division in which all qualified voters may vote upon a candidate or candidates, as the state in case of state officers; the city in case of city officers, etc."

White attempted, on August 27, 1954, to file as a non-partisan candidate under Sections 120.330 through 120.650, RSMo 1949. The closing date for filing as a non-partisan candidate was April 27, 1954. Therefore, this belated attempt to file is of no effect.

Board of Election Commissioners

CONCLUSION

In the premises, therefore, it is the opinion of this office that the name of Earl White should not appear on the ballot in the forthcoming General Election as a candidate for the office of Representative to the General Assembly from the Seventeenth District.

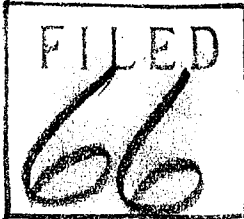
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk:vlw

ACQUIREMENT OF LANDS
UNDER CONSTITUTION:



The power to acquire land is by the constitution of Missouri conferred upon the State Park Board; upon the Conservation Commission; upon the State Highway Commission for the purposes enumerated in subsection 3 of Section 30 of Article IV of the Constitution of Missouri; and upon any department authorized by the legislature for the purposes enumerated in Section 48 of Article III of the Constitution of Missouri.

November 29, 1954

Honorable Edgar C. Nelson
State Purchasing Agent
Division of Procurement
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Section 34.030 of the Missouri Procurement laws reads as follows:

"'Shall purchase all supplies and lands -- The purchasing agent shall purchase all supplies for all departments of the state, except as in this chapter otherwise provided. The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state.'

"How can I know what departments derive this power from the Constitution?

"This request for an opinion stems from an inquiry from the Missouri Park Board as to the proper course for the board to pursue in acquiring additional land for one of the present state parks."

The only means whereby this matter may be determined is by an examination of the constitution. Such an examination reveals that by Section 41 of Article IV of the Constitution, the power to acquire land is vested in the Conservation Commission. That section reads:

Honorable Edgar C. Nelson

"The commission may acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for its purposes, and shall exercise the right of eminent domain as provided by law for the highway commission."

Likewise, Section 47 of Article III of the Constitution confers this power of acquiring land upon the State Park Board. That section reads:

"For fifteen years from the day this Constitution takes effect the general assembly shall appropriate for each year out of the general revenue fund, an amount not less than that produced annually at a tax rate of one cent on each one hundred dollars assessed valuation of the real and tangible personal property taxable by the state, for the exclusive purpose of providing a state park fund to be expended and used by the agency authorized by law to control and supervise state parks, for the purposes of the acquisition, supervision, operation, maintenance, development, control, regulation and restoration of state parks and state park property as may be determined by such agency; and thereafter the general assembly shall appropriate such amounts as may be reasonably necessary for such purposes."

Section 48 of Article III of the Constitution, reads:

"The general assembly may enact laws and make appropriations to preserve and perpetuate memorials of the history of the state by parks, buildings, monuments, statutes, paintings, documents of historical value or by other means, and to preserve places of historic or archaeological interest or scenic beauty, and for such purposes private property or the use thereof may be acquired by gift, purchase, or eminent domain or be subjected to reasonable regulation or control."

The above section confers power upon any department to acquire land for the purposes enumerated above, when the legislature enacts a law to that effect, and such power of acquisition we conceive to be derived from the constitution.

We would also direct attention to subsection 3 of Section 30 of Article IV of the Constitution of Missouri, which reads:

Honorable Edgar C. Nelson

- "(3) In the discretion of the commission to locate, re-locate, establish, acquire, construct and maintain the following:
- "(a) supplementary state highways and bridges in each county of the state as hereinafter provided;
 - "(b) state highways and bridges in, to and through state parks, public areas and reservations, and state institutions now or hereafter established, and connect the same with the state highways; and also national, state or local parkways, travelways, or tourways, with coordinated facilities;
 - "(c) any tunnel or interstate bridge or part thereof, where necessary to connect the state highways of this state with those of other states;
 - "(d) any highway within the state when necessary to comply with any federal law or requirement which is or shall become a condition to the receipt of federal funds;
 - "(e) any highway in any city or town which is found necessary as a continuation of any state or federal highway, or any connection therewith, into and through such city or town; and
 - "(f) additional state highways, bridges and tunnels, outside the corporate limits of cities having a population in excess of 150,000, either in the congested traffic areas of the state or where needed to facilitate and expedite the movement of through traffic."

The above, we believe, gives the state highway commission the authority to acquire land for the purposes enumerated above, and this power we also conceive to be derived from the constitution.

CONCLUSION

It is the opinion of this department that the power to acquire land is by the Constitution of Missouri conferred upon the state park board; upon the conservation commission; upon the state highway com-

Honorable Edgar C. Nelson

mission for the purposes enumerated in subsection 3 of Section 30 of Article IV of the Constitution of Missouri; and upon any department authorized by the legislature for the purposes enumerated in Section 48 of Article III of the Constitution of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

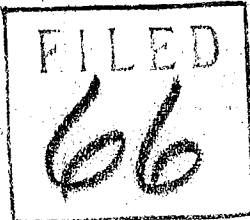
HPW/ld

JOHN M. DALTON
Attorney General

STATE PURCHASING AGENT:
DIRECTOR OF PUBLIC BUILDINGS:

Contracts for labor and materials involved in the construction of appurtenances to buildings which involve engineering or mechanical skills should receive the approval of the director of public buildings.

December 14, 1954



Mr. Edgar C. Nelson
State Purchasing Agent
Capitol Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads in part as follows:

"Will you please give me an opinion that will clarify the jurisdiction of this division on orders that fall in the category 'borderline cases' so far as this division and the office of Superintendent of Public Buildings is concerned.

"For example, I have before me two departmental direct orders from the State Federal Soldiers' Home, one in the sum of \$52.50 and calling for the payment of 35 hours of bricklaying for manholes for new sewer; the other, in the sum of \$96 is in payment for use of a compressor for eight hours, drill bits, steel bit, dynamite, blasting caps and fuses.

"* * * A similar case involved the grading of a parking lot at the State Sanatorium at Mt. Vernon, * * *."

You inquire whether certain stated projects and similar transactions fall within the duties of the state purchasing agent or the director of public buildings. It appears that in one instance certain bills for labor and materials were

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contracted in connection with the installation of a sewer line at the state Federal Soldiers' Home, and that in the other, certain bills for labor were contracted in connection with the building of a parking lot at the State Sanatorium at Mt. Vernon, Missouri. We will note briefly the duties of the state purchasing agent and the director of public buildings, so far as they are here pertinent. Section 34.020 provides for the appointment by the Governor of a state purchasing agent. Section 34.030 provides that the purchasing agent shall purchase all supplies for all departments of the state and shall negotiate all leases and purchase all land except for such departments as derive such authority from the Constitution. Said section more fully provides:

"The purchasing agent shall purchase all supplies for all departments of the state, except as in this chapter otherwise provided. The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state."

Section 34.010 defines the terms "supplies" and "contractual services" as follows:

"1. The term 'supplies' used in this chapter shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this chapter otherwise provided.

"2. 'Contractual services' shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service. * * *"

Section 8.020 provides for the appointment by the Board of Public Buildings of a director of public buildings who shall be qualified by training and experience to deal with construction, operation, maintenance and repair of buildings and shall be of recognized competence in the field of building administration. Said section more fully provides in part as follows:

"The board of public buildings shall appoint a director of public buildings who shall be qualified by training and experience to deal

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with construction, operation, maintenance and repair of buildings, and shall be of recognized competence in the field of building administration. * * *

Section 8.070 provides that the director shall serve as advisor and consultant to all department heads in letting contracts, supervising construction, inspection and maintenance of buildings, etc., and further provides that no contract shall be let for repairs, rehabilitation or construction of buildings without the approval of the director, and that no claim for such matters shall be paid without the approval of the director. Section 8.070 reads:

"The director shall serve as an advisor and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. No contracts shall be let for repair, rehabilitation, or construction of buildings, without approval of the director, and no claim for repair, construction or rehabilitation projects under contract shall be accepted for payment by the state without approval by the director; * * *

Section 8.080 provides that the director shall promulgate conditions and procedures to be followed in the repair, maintenance, operation, construction and administration of state buildings, and Section 8.050 provides that the director shall formulate and recommend a current and long range repair, construction and rehabilitation program.

While the above-noted statutes relating to the duties of the director of public buildings deal with "buildings" which would seem at first reading to preclude projects such as are here under consideration, we do not believe that the duties of said officer should be so limited. In the case of *Swasey v. Shasta County*, 74 P. 1031, decided by the Supreme Court of California, an action was brought to prohibit the county supervisor from entering into a contract for the construction of an iron fence around the grounds upon which the courthouse was situated. The California statutes conferred upon said supervisor the authority to provide a courthouse, jail, hospital, "and such other buildings as may be necessary." The statute above mentioned contained other provisions relating to the advertisement for bids, letting of contracts, etc., substantially like our law relating to the duties of the director of public buildings. The contention was made that the supervisors had no

Mr. Edgar C. Nelson

authority to enter into such a contract, since the term "such other buildings" did not include fences. In reference to the term "building," as used, the court said:

" * * * There is no well-established legal definition of the word 'building' which absolutely and under all circumstances either includes or excludes a 'fence.' The question greatly depends upon the connection in which the word 'building' is used, and the evident purpose of the statute or contract in which it is found. In 1 Bouvier's Law Dictionary (Rawle's Ed.) p. 269, 'Building' is defined as follows: 'An edifice erected by art, and fixed upon or over the soil, composed of stone, brick, marble, wood or other proper substance, connected together, and designed for use in the position in which it is so fixed.' This is about as good a general definition of the word as can be found in the books, and it undoubtedly includes, in terms, an ordinary fence. * * *"

Under the above-noted rule, which we deem to be a correct statement of the law, we must keep in mind the duties and qualifications of the director of public buildings as above noted. Both of the projects which are the subject of this opinion, i.e., the sewer line and parking area, are connected either directly or by intended use to a structural building, and is either an integral part or an appurtenance thereto. If there were no other factors, we would deem this sufficient to require the approval of a director of public buildings, but aside from such factors we wish to note that each of these projects involves, in our opinion, some construction, mechanical or engineering skills. Noting also that under the provisions of Section 8.020 supra the director of public buildings is required to be "qualified to deal with construction", we are of the opinion that such matters as are here under consideration are intended to come within the duties and responsibilities of the director of public buildings.

Further, and in support of such conclusion, we again turn to the duties of the state purchasing agent. He is required to purchase all supplies, except as in this chapter otherwise provided. The term "supplies" is defined in 34.010, noted supra, to be supplies, materials, equipment, contractual services, etc. The term "contractual services" is defined as including telephone, telegraph, postal, electric light and power service, and water, towel, and soap service. The contracts here under consideration involve principally labor. Surely such could not be deemed to be included in the terms "material,

Mr. Edgar C. Nelson

equipment or supplies" as those terms are commonly understood. We are further of the opinion that labor cannot fall within the term "contractual services" as the term is used in the Purchasing Agent Act, in view of the well-known canon of statutory construction that the expression of one thing or class of things is the exclusion of another: Expressio unius est exclusio alterius. Keane v. Strodtman, 18 S.W. 2d 896. The class of services included in the term "contractual services" would appear to exclude contracts for labor. If the term "contractual services" was given a broader meaning than that stated, it would include services (labor) to be performed under a contract for the construction of an office building, which clearly falls within the duties of the director of public buildings.

CONCLUSION

Therefore, it is the opinion of this office that contracts for labor and materials in connection with the construction of a sewer line at the state Federal Soldiers' Home, and contracts for labor in connection with the grading of parking lot at the State Sanatorium should receive the approval of the director of public buildings, since both projects constitute appurtenances to buildings and involve to some degree engineering or mechanical skills peculiarly within the knowledge of said director.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

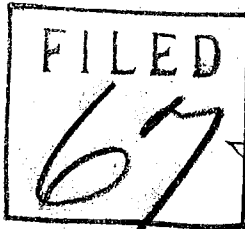
Yours very truly,

John M. Dalton
Attorney General

DDG:vtl,lw

MUNICIPALITIES:
TRAFFIC REGULATION:
OFF-STREET PARKING:

- (1) Municipality of appropriate population may issue revenue bonds to provide off-street parking facilities without submitting proposition to vote of the electorate.
- (2) Such bonds may not be retired from general revenue receipts of municipality.



March 11, 1954

Mr. Wm. Harrison Norton
Representative, Clay County
406 Armour Road
North Kansas City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"

* * *

"My first question is: Is it possible for the City of Liberty to authorize a bond issue for the construction of off-street parking facilities without submitting same to a vote of the people.

"My second question is: May the bonds be financed with the receipts from the parking meters presently installed in the city. In other words, can the City of Liberty pledge the parking meter receipts from their parking meters to the payment of the bonds. * * *"

Your attention is directed to Section 71.350, RSMo 1949, reading as follows:

"Any incorporated city or town in this state of not more than seven hundred thousand and not less than one thousand population may rent, lease and improve property, or acquire property by gift,

Mr. Wm. Harrison Norton

purchase, exchange, or by the exercise of the power of eminent domain over unimproved property in the manner provided by law for the condemnation of land for street purposes in such municipality; provided, however, that nothing herein shall be construed to limit the right to the use of eminent domain in connection with improved property used for or devoted to commercial purposes, and may construct, install or equip buildings and facilities thereon for parking motor vehicles, and may own, manage, use or operate property and facilities thereon for parking motor vehicles, or rent or lease property and facilities to others for parking motor vehicles, and make or authorize the making of a charge for the use of property and facilities for such purpose, provided, however, such municipality shall not dispense or furnish or allow any lessee or occupant to dispense or furnish, upon or in connection with any property or facility acquired or operated pursuant to this section any product or service other than the parking of motor vehicles."

It is readily apparent that by the enactment of this statute the General Assembly has delegated to any municipality having the appropriate population, within the maximum and minimum limits set out, the authority to establish off-street parking facilities.

Provision for the financing of such facilities has further been made through the enactment of Section 71.360, RSMo 1949, which reads as follows:

"Any such incorporated city or town is hereby empowered to finance and pay for the planning, designing, acquisition, construction, equipment and improvement of property for parking motor vehicles by any one or combination of the following methods:

"(1) General revenue funds, including any proceeds derived from the operation of said parking facilities;

Mr. Wm. Harrison Norton

"(2) General obligation bonds within legal debt limitations;

"(3) Negotiable interest-bearing revenue bonds, the principal and interest of which shall be payable solely from the revenues derived by such municipality from the operation of such parking facilities, which revenue bonds may be issued and sold by the municipality when so authorized by the city council, board of aldermen, or other legislative authority of such city."

The constitutionality of these statutes has been upheld by the Supreme Court of Missouri in *Kansas City v. Fishman*, reported, 241 S.W. (2d) 377, wherein both statutes were directly under attack. The same case also involved the propriety of issuing revenue bonds to finance the acquisition and construction of such off-street parking facilities, absent an election having been held. The city council of the plaintiff city in the case mentioned had simply enacted an ordinance authorizing the establishment and operation of the off-street parking facilities.

The particular constitutional provision claimed to have been violated was Section 27, Article VI of the Constitution. The Supreme Court held that this particular constitutional provision was inapplicable to the issuance of bonds of the nature contemplated under Section 71.360, RSMo 1949, inasmuch as the type of municipal facility under consideration was not one requiring the assent of four-sevenths of the electorate before revenue bonds might be issued. The Court in disposing of the constitutional question held:

"* * * Thus this constitutional provision prohibits the Legislature from authorizing revenue bonds, for the purpose of paying for municipally owned water, gas or electric light works, heating or power plants or airports, which are not approved by vote of four-sevenths of the qualified electors. However, we agree with appellant that the proposed parking facility is not such a utility as contemplated by this constitutional provision; and, therefore, the Legislature has complete authority to authorize revenue bonds issued for that

Mr. Wm. Harrison Norton

purpose. (Of course, other provisions of the Constitution prohibit the Legislature from making such revenue bonds payable out of funds raised by taxation as the authorities hereinafter cited show.) The Legislature has granted the authority for these revenue bonds to the City by enacting Sections 71.350-71.360, R.S. 1949."

Your second question relates to the propriety of using receipts from parking meters now installed on the streets in the City of Liberty for the purpose of retiring bonds issued for the purpose of establishing and operating the off-street parking facilities.

Section 71.360, RSMo 1949, quoted supra, authorizes the issuance of two types of bonds. First, general obligation bonds within legal debt limitations and secondly, revenue bonds payable solely from the revenues derived from operation of parking facilities.

The receipts derived from parking privileges granted through the use of parking meters do not represent "taxes" but on the contrary are simply to be classed as "general revenue" of the city. Such receipts may be used for a legitimate municipal purpose. Therefore such receipts could be used to apply towards the retirement of bonds representing general obligations of the city which are issued pursuant to Subsection (2) of Section 71.360, RSMo 1949.

With respect to revenue bonds which might be issued under the provisions of Subsection (3) of Section 71.360, RSMo 1949, a different situation presents itself. You will observe that this statute limits the funds available for the retirement of such revenue bonds from revenues derived by the municipality from the operation of off-street parking facilities. This authorization does not seem to be broad enough to include receipts derived from parking meters installed elsewhere on the streets of the city.

CONCLUSION

In the premises we are of the opinion that a city of the appropriate population within the maximum and minimum limits fixed by Section 71.350, RSMo 1949, may provide by

Mr. Wm. Harrison Norton

ordinance for the establishment and operation of off-street parking facilities and for the issuance of revenue bonds for such purposes as provided by Subsection (3) of Section 71.360, RSMo 1949, without submitting the proposition to the vote of the electorate.

We are further of the opinion that the receipts derived by such municipality from parking meters installed elsewhere than upon such off-street parking facilities may not be devoted to the retirement of such bonds.

We are further of the opinion that if general obligation bonds of the city are issued pursuant to authorization therefore having been voted by the inhabitants within legal debt limitations as provided by Subsection (2) of Section 71.360, RSMo 1949, such parking meter receipts may be so used for the retirement of such general obligation bonds.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

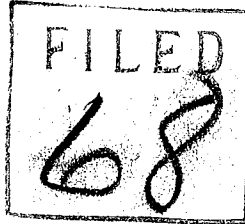
Very truly yours,

JOHN M. DALTON
Attorney General

WFB:vlw

COUNTY FARM BUREAUS:
TAXATION:

Counties of fourth class not authorized to levy tax for support and maintenance of county farm bureau subject to Sections 262.550 to 262.620, RSMo 1949, as amended.



March 1, 1954

Honorable Don W. Owensby
Prosecuting Attorney
Dallas County
Buffalo, Missouri

Dear Mr. Owensby:

The following opinion is rendered in reply to your recent request reading as follows:

"Our local County Agent has raised the question as to whether or not our county can have an election for the purpose of placing a tax on the assessed property in the county for use by the County Extension Service for education purposes. We have a similar tax in this county for County Health Unit and County Library District.

"The specific question is: Does the law provide for a special tax, to be voted by the voters of the county in counties of Class Four such as Dallas County, such tax to be used by local County Extension Office for the diffusing of farm education practices."

Sections 262.550 to 262.620, RSMo 1949, as amended, constitute the basic law governing county farm bureaus. Within the framework of these special statutes we find no power vested in a county, as a political subdivision, to levy taxes for the support of such bureaus. We find only a mandatory duty imposed on counties to appropriate from general

Honorable Don W. Owensby

revenues for the support of the county farm bureaus established pursuant to the statutes referred to above. Section 262.580, RSMo 1949 (A.L. 1953 S.B. 173) provides as follows:

"1. The board of directors of the county farm organization, in cooperation with the county court and the University of Missouri college of agriculture, shall prepare an annual financial budget covering the county's share of the cost of carrying on cooperative extension work in agriculture and home economics provided for in sections 262.550 to 262.620, which shall be filed with the county court of such county, and shall be included by said county court in class four of the budget of county expenditures for such year in counties budgeting the county expenditures by classes and in all other counties in the budget document, subject to the following restrictions: (1) In counties of the first and second classes, the minimum appropriation shall be two thousand five hundred dollars. (2) In counties of the third class, the minimum appropriation shall be two thousand dollars. (3) In counties of the fourth class, the minimum appropriation shall be one thousand dollars.

"2. Provided, that no county shall appropriate more than one dollar per capita of the rural population as determined by the latest decennial federal census; provided further, that in any year in which the county farm organization approves a budget of lesser amount than is herein provided, then the lesser amount so approved shall be appropriated by the county court."

Article X, Section 1, Missouri Constitution of 1945 provides:

"The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes."

Honorable Don W. Owensby

In Giers Implement Corporation v. Investment Service, 361 Mo. 504, 235 S.W. (2d) 355, 1.c. 358, we find the applicable rule stated in the following language:

" * * * the power to tax is a governmental function inherent in the state (more precisely stated 'inherent in the sovereign people of the State'), exercised by the legislature subject to constitutional limitation."

No constitutional or statutory provision has been found which authorizes a county of the fourth class to levy a tax for the support and maintenance of a county farm bureau formed under Sections 262.550 to 262.620, RSMo 1949, as amended, and in the absence of such authorization the tax would be invalid.

CONCLUSION

It is the opinion of this department that a county of the fourth class in Missouri is without authority to levy a tax for the support and maintenance of a county farm bureau formed under Sections 262.550 to 262.620, RSMo 1949, as amended.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO'M:vlw

OPTOMETRY: It is unlawful for an osteopath to advertise as a
OSTEOPATHS: registered optometrist when not duly licensed by
the State Board of Optometry to practice optometry
in this State.



April 19, 1954

Missouri State Board of Optometry
359 Paul Brown Building
St. Louis 1, Missouri

Att: Mr. J. R. Bockhorst, O. D.,
Secretary

Gentlemen:

This will acknowledge receipt of your request for an opinion,
the pertinent part of which reads:

"As Secretary to the Missouri State Board of
Optometry I hereby request an opinion from
your office as to the legality of the fol-
lowing question.

"Is it legal for an Osteopath or any person
to advertise or cause to be advertised the
statement 'Registered Optometrist' in con-
nection with their name, in any manner to
the public, without the benefit of a regis-
tered certificate as issued by the Missouri
State Board of Optometry as provided in
Chapter 336, Revised Statutes of Missouri,
1949, pages 2632-2638."

Chapter 336, RSMo 1949, contains the Optometry Act passed by
the Legislature and Section 336.120 RSMo 1949 reads in part:

"The following persons, firms and corporations
are exempt from the operation of the provisions
of this chapter except the provisions of section
336.200:

(1) Physicians or surgeons of any school
lawfully entitled to practice in this state; * * *

Missouri State Board of Optometry

In view of the foregoing provision, we are inclined to be of the opinion that a duly licensed and practicing osteopath in this State comes within this exemption as they are considered physicians or surgeons and lawfully entitled to practice in this State.

The case of *Stribling v. Jolley*, 253 SW2d, 519, involved the right of osteopaths to practice in county hospitals. The county hospital act, Section 205.300 RSMo 1949 in part provided that no discrimination shall be made against practitioners of any school of medicine recognized by the laws of Missouri. The court, in construing the foregoing provision, concluded, "From this it seems obvious that the legislature, in prohibiting the boards of county hospitals from discriminating against any school of medicine, used language that included osteopathic physicians." The latter part of said section provides that the patient in the hospital has absolute right to the physician of his choice and the court concluded that the legislature, in enacting said provision, considered and called the doctors of osteopathy physicians.

So, in view of said decision, certainly osteopaths come within Section 336.120 RSMo 1949, Subsection 1, as being exempt from the operation and provisions of said chapter on registration of optometrists except the provisions of Section 336.200 RSMo 1949.

Section 336.200 supra, reads:

"It shall be unlawful for any optometrist or any other person, firm or corporation engaged in the manufacture or sale of eyeglasses or lenses to advertise or cause to be advertised any claim or statement which quotes the words 'eyes examined free' or any words or phrases of similar import which would imply to the public that an eye examination will be made without cost or in which said advertisement there is contained any statement which seeks to deceive or mislead the public. The violation of any provision of this section shall constitute a misdemeanor, punishable upon conviction, by a fine of not less than twenty-five dollars nor more than two hundred dollars."

Said statute would include osteopaths engaged in the sale of eyeglasses or lenses. This statute prohibits such persons from

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advertising or causing to be advertised any claim or statement to the effect that eyes are to be examined free or any similar statement that examination would be free. The second part of said statute further prohibits any claim or statement in any such advertisement which seeks to deceive or mislead the public.

The question boils down to this, does the latter part of said statute relate only to any statement that said examination will be free or some statement in the nature of offering free service of examination of eyes or does it relate to any material matter in said advertisement not having any relation to cost or free examination but seeking to deceive or mislead the public?

Speaking of interchangeable use of words "or" and the word "and," Crawford on statutory construction, Section 888, page 322, said in part:

"As a result of this common and careless use of the two words in legislation, there are occasions when the court, through construction, may change one to the other. This cannot be done if the statute's meaning is clear or if the alternative operates to change the meaning of the law. It is proper only in order to more accurately express or carry out the obvious intent of the legislature; * * *"

In State ex rel. Stinger v. Krueger, 280 Mo. 293, l.c. 309, the court, in construing the word "or" and the word "and" as used in a statute, said:

"The word 'or' in statutes or documents is frequently interpreted to mean 'and,' and this interpretation is given to it whenever required to carry out the plain purpose of the act or contract and when to adopt the literal meaning would defeat the purpose or lead to an absurd result, * * *"

We believe the legislature intended that the words "or" and "and" as used in Section 336.200 supra, should be construed in its ordinary literal meaning. We say this for the reason that said section, after providing that it shall be unlawful for any person selling glasses to advertise any claim or statement quoting words, "eyes examined free," continues by including the following words which we claim are all-inclusive of any statement or claim relative to free examination, "or any words of similar

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import which would imply to the public that an eye examination will be made without cost." To hold that the next following words in said paragraph also relate to statements effecting a free examination of the eyes would be an absurd construction. These words are "or in which said advertisement there is contained any statement which seeks to deceive or mislead the public."

A well established rule of statutory construction is that effect must be given, if possible, to every word, clause, sentence, paragraph, and section of the statute, so that one section or part will not contradict, conflict with or destroy another. State ex rel. St. Louis Die Casting Corp. v. Morris, 219 SW2d, 359, 358 Mo. 470. Therefore, in order to give meaning to every word and sentence in said statute, we must hold that the last quoted words in said statute do not simply refer to free cost of examination but anything else that might deceive or mislead the public.

In view of the foregoing construction of Section 336.200 supra, the question now is, does said osteopath, by including in his advertisement "Registered Optometrist" deceive or mislead the public?

We are assuming for the sake of this opinion only, that said osteopath is not actually at this time a duly licensed optometrist under the provisions of Chapter 336 supra, relative to practice, licensing and administration of optometrists.

In such case, such a statement in an advertisement certainly might deceive or mislead the public. Some person might call upon said osteopath to examine their eyes or purchase eyeglasses that might not consider doing so if he were not a licensed optometrist. The law further provides that any violation of the provisions of Section 336.200 supra, constitutes a misdemeanor.

CONCLUSION

Therefore, it is the opinion of this department that a duly licensed osteopath may practice optometry without being licensed to practice optometry by Missouri State Board of Optometry, under the exemption clause of Section 336.120 supra; however, it is unlawful and in violation of Section 336.200 supra for an osteopath not a licensed optometrist to advertise that he is a "Registered Optometrist."

Missouri State Board of Optometry

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

ARH:sm

Dugan
COUNTY COURT: It is mandatory duty of county court of fourth class
ASSESSOR: county to furnish assessor of said county with office
space, and if no space is available in county court-
house, then it must provide space somewhere else even
to the extent of paying rent for an office for said
assessor.



June 16, 1954

Mr. Don W. Owensby
Prosecuting Attorney
Dallas County
Buffalo, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion
which reads:

"Please supply this office with an opinion re-
garding the following question:

"Does the law require or permit the county
court of a county of Class Four to use county
funds to pay rent for office space for our
County Assessor outside of the court house?
We have no space in the court house for an
office for the County Assessor. I find nothing
in the law which requires the county court to
furnish an office for the County Assessor."

Under Section 7, Article VI, Constitution of Missouri, it
provides that the county court shall manage all county business as
prescribed by law. Section 49.510 RSMo 1949 further makes it man-
datory that the county court shall provide offices or space for
county officials so as to properly perform their official duties.

In view of the foregoing statutory and constitutional pro-
visions, there can be no question but that the county court shall
furnish such assessor office space. This department so held, in
an opinion rendered to Honorable Allen Rolston, Prosecuting At-
torney, Schuyler County, under date of December 21, 1949. Also
this department rendered an opinion to Honorable Thomas A. Matthews,
Prosecuting Attorney, St. Francis County, Missouri, under date of

Mr. Don W. Owensby

August 8, 1936, which likewise holds that the county must furnish and pay for reasonable office expense of county officers, which opinion does not go quite so far as to specifically hold that the county court shall furnish office space for county officers to the extent of renting an office if necessary; however, the implication is that it shall do so. We are enclosing copies of the foregoing opinions for your perusal.

The decisions referred to in the enclosed opinions previously rendered by this department held that where the law makes it the duty of the county court to provide suitable office space, heat, lights, janitor service and other necessary expenditures for certain county officers and said county court fails to do so, then the county officer had a right to secure same and the county court is bound to reimburse such officer for cost of same. *Buchanan v. Ralls County*, 283 Mo. 10; *Harkreader v. Vernon County*, 216 Mo. 696; *Ewing v. Vernon County*, 216 Mo. 1.c. 692.

In view of the foregoing decisions, we must conclude that the county court shall furnish the assessor in a fourth class county with an office or space for an office and if there is no available space in the county courthouse, then the county court shall provide office space somewhere else even to the extent of renting said assessor an office.

CONCLUSION

It is the opinion of this department that it is mandatory upon the county court of a fourth class county to furnish an assessor of said county an office and if there is no space available in the county courthouse, said court must provide space elsewhere even to the extent of paying rent for an office for said assessor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

ARH:sm

Enc. (2) Hon. Thomas A. Matthews,
8-8-36
Hon. Allen Rolston,
12-21-49

COMMERCIAL MOTOR VEHICLES:
RECIPROCITY BETWEEN FLORIDA
AND MISSOURI:

A commercial motor vehicle registered and owned in the state of Florida, which loads material in St. Louis, Missouri, transports it to Louisiana, Missouri, where it is unloaded, must also be registered in Missouri.



December 15, 1954

Honorable Gaylord P. O'Connor
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"I respectfully request an opinion on the following set of facts:

"'A', a resident of the State of Florida, is the owner of a commercial motor vehicle duly registered in that state. 'A' picks up a load of pipe in St. Louis, Missouri. This load is transported to Louisiana, Missouri, where the pipe is unloaded and processed. The same pipe is then reloaded in 'A's' truck for delivery in Florida.

"Is 'A' required, under Sec. 301.270, to pay a registration fee in the State of Missouri?

"I would appreciate an opinion with as much facility as the burdens of your office permit, as the matter has recently arisen in this county."

Your inquiry raises the question whether or not Missouri and Florida have reciprocity as to commercial motor vehicles. The Missouri reciprocity statute, Section 301.270 RSMo 1949, reads:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place

Honorable Gaylord F. O'Connor

of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, county or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

The Florida reciprocity statute, Section 320.37, Florida Statutes, 1953, reads:

"The provisions of this chapter relative to registration and display of license number plates shall not apply to a motor vehicle owned by a nonresident of this state, other than a foreign corporation doing business in this state; provided, that the owner thereof shall have complied with the provisions of the law of the foreign country, state, territory or federal district of his residence, relative to motor vehicles and the operation thereof, and shall conspicuously display his registration number as required thereby; but such exemption shall not apply to motor vehicles operated for hire."

It will be noted that the concluding clause states that such exemption shall not apply to motor vehicles operated for hire.

Section 320.16, Florida Statutes, 1953, reads:

"Where any automobile is used for hire, whether for carrying passengers or freight either singly or in combinations, over the highways of the state, in interstate commerce, a charge shall be collected in the form of a registration fee initially computed and assessed on the basis of the foregoing schedule, and the same shall be collected upon the registration of the vehicle as an advance payment on the compensation entitled to be received by the state for the use of the state's highway system, but the person so registering or re-registering said vehicle shall be entitled to a refund of the entire amount collected with legal interest thereon upon making payment to the state for the mileage actually traveled by the vehicle in its use of the state's highway system, to be paid for at the rate of four cents

Honorable Gaylord P. O'Connor

per mile each way, which rate of four cents per mile each way is determined and declared to be a reasonable and just compensation to be charged and collected for the use of the improved highway system provided by the state and its several counties, districts and municipalities for the use of motor vehicles. Proof of the mileage traveled shall be made to the state motor vehicle commissioner, who shall ascertain and determine the number of miles actually traveled by the vehicle, which mileage would be subject to the charge of a mileage tax under this chapter, and the findings of said commissioner when made after full hearing shall be deemed and held to be prima facie just and correct, but subject to judicial review in appropriate proceedings brought for that purpose by the claimant against the state motor vehicle commissioner to enforce such refund."

From the above, it is plain that Missouri does not, on the basis of the statutes of Missouri and Florida, have reciprocity with Florida as to commercial motor vehicles operated for hire, and that, therefore, on the basis of the statutes alone, a commercial motor vehicle registered in Florida and operated in Missouri, either in interstate or intrastate commerce, or in both, would have to be registered in Missouri.

However, on February 25, 1947, a reciprocity agreement, which is still in effect, was entered into between the State of Missouri and the State of Florida. That agreement, on the part of Missouri, was signed by Morris Osborn, Chairman of the Missouri Public Service Commission, and by Hinkle Statler, Commissioner of Motor Vehicles. On the part of Florida, the agreement was signed by the persons designated in what is now Section 320.39, Statutes of Florida, 1953, which reads:

"The state motor vehicle commissioner of the State of Florida, the state road department of the State of Florida and the railroad commission of the State of Florida may negotiate and consummate with the proper authorities of the several states of the United States, reciprocal agreements whereby residents of such other states operating motor vehicles properly licensed and registered in their respective states, may have such privileges and exemption in the operation of their said motor vehicles, in this state, as residents of this state may have and enjoy in the operation of motor vehicles, duly licensed and registered in this state, in such other states; provided, nothing herein shall be construed to relieve

Honorable Gaylord P. O'Connor

any motor vehicle owner or operator from complying with and abiding by all other applicable laws, rules and regulations relating to safety of operation of motor vehicles and the preservation of the highways of this state. In the making of such reciprocal agreements, the said motor vehicle commissioner, the said state road department and said railroad commission shall have due regard to the advantage and convenience of motor vehicle owners and the citizens of this state.

"Any and all such reciprocal agreements consummated by said motor vehicles commissioner, the state road department and the railroad commission shall not become effective until approved by the governor of the State of Florida; provided, all such reciprocal agreements by said motor vehicle commissioner, the state road department and said railroad commission are made subject to cancellation at any time by the legislature of the State of Florida; provided, however, that nothing herein contained shall apply to rates, rules or regulations now or hereafter applicable to common or contract carriers by motor transportation companies over the highways of the State of Florida.

"The motor vehicle commissioner, the state road department and the railroad commission shall give proper publicity to the terms of every such reciprocal agreement entered into by them, or either of them."

From the above it will be seen that the persons designated to sign reciprocal agreements by the Florida statutes may, for the duration of the reciprocal agreement, suspend the operation of such Florida laws as would prevent reciprocity with other states and thereby bring the state of Florida into a position of reciprocity with another state or states. This, as to interstate commerce, was done by the aforesaid reciprocity agreement between Missouri and Florida. This is made plain by the following portion of that agreement:

"Pursuant to and in conformity with the laws of the State of Florida and the laws of the State of Missouri, it is mutually agreed between said two states acting through their authorized representatives that each state will recognize and permit the operation in that state of commercial or private motor vehicles (which term is used in its broad meaning and intended as being likewise inclusive of trailers, semi-trailers, passenger cars, buses, trucks and

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road tractors) in an interstate for-hire or private capacity when owned and properly registered in the other state without requiring the payment in the state of non-domicile (reciprocating state) of any mileage tax, registration fees, except as hereinafter provided, public service commission fees, license or 'tag fees' or any other road use taxes or motor vehicle identification fees of any nature regardless of the manner of name and designation of such fees;* * *".

This, as we pointed out before, relates only to and affects only reciprocity as to interstate commerce.

Section 5 of the agreement makes very plain the fact that intrastate operations are excluded from the agreement. It reads:

"That this agreement shall not be construed in any way as a grant of intrastate rights and privileges. Provided further that if a citizen of either state engages in a local intrastate gainful occupation or places his children in the public schools of the other state, he shall equip his motor vehicles with the proper license plates of the latter state."

We believe it to be clear that intrastate operations are involved in the situation set forth by you. You state that a commercial motor vehicle licensed and owned in Florida appears empty in St. Louis, Missouri, takes on a load of material, transports it to Louisiana, Missouri, and unloads it. This is a commercial motor vehicle operation which began and ended in Missouri, and which is distinct and separate from any operation prior to and subsequent to it. It is intrastate commerce as intrastate commerce has been defined in many cases. We here direct attention to a number of these cases.

The case of Southern Pacific Company vs. State, 165 P. 303, was one in which the court held that a railroad transporting a road show from Tucson, Arizona to Phoenix, Arizona, was an intrastate movement, subject to the jurisdiction of the Arizona Corporation Commission although the road show was engaged in a journey beginning in Texas and ending in California.

In the case of State vs. Lone Star Gas Co., 86 S.W.2d, 848, the court held that uninterrupted transportation of natural gas produced in Texas through a corner of Oklahoma and back into Texas for sale in Texas was intrastate commerce.

Honorable Gaylord P. O'Connor

In the case of *Yohn v. United States*, 280 Fed. 511, the court held that intrastate commerce is that commerce which is, during its whole course of transportation, within the jurisdiction of a single state.

In the case of *Blackmar v. Public Service Commission*, 183 Atl. 115, the court held that evidence that mixed merchandise was moved wholly within a state between termini in state showed that movement was intrastate commerce, subject to regulation by the public service commission. The case also held that motor carriers' movement of yarn from Pennsylvania throwing mills to Pennsylvania weaving mills on an all Pennsylvania route was interstate commerce, subject to regulation by the public service commission, notwithstanding that the yarn was made from raw silk transported to the throwing mills from other states, and that cloth made from the yarn in the weaving mills was transported to dye works in another state.

In view of the above cases, we believe that the movement of material from St. Louis, Missouri, to Louisiana, Missouri, constitutes intrastate commerce, which was excluded from the Missouri-Florida reciprocal agreement of February 25, 1947, and that, therefore, in the situation which you set forth, the Florida motor vehicle must be registered in Missouri.

CONCLUSION

It is the opinion of this department that a commercial motor vehicle registered and owned in the state of Florida, which loads material in St. Louis, Missouri, transports it to Louisiana, Missouri, where it is unloaded, must also be registered in Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

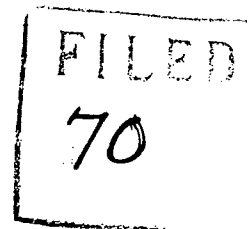
PROSECUTING ATTORNEY:
CIVIL ACTIONS:
COUNTIES:

1. An action instituted by a Prosecuting Attorney, ex officio, for the abatement of an obstruction across a county road is an action brought by the State; 2. Although such action is unsuccessful by reason of adverse judgment or a continuance at any state of the proceedings no costs can be collected from the State; 3. In such a situation the county in which the action was begun would not be liable for such costs.

February 1, 1954

OPINION NO. 70

Honorable John P. Peters
Prosecuting Attorney
Osage County
Linn, Missouri



Dear Mr. Peters:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"On July 5th, 1952, I as prosecuting attorney, instituted an action in the name of the State of Missouri v. Loyd Ridenhour, and two others as commissioners, of 'Jefferson Township Special Road district', of and in said Township, in Osage County, to restrain them from erecting a certain 'Low Water Bridge' in and across Mistaken Creek, in said Road District, where a county public road crosses said creek, alleging that the said proposed construction, if erected would be an obstruction and purpres-ture, in said road, and creek, and praying in the name of the state's visitorial power, for a temporary restraining order, which was granted by Judge R. A. Breuer, at the time, restraining the said Commissioners, from erecting, the said proposed structure in said road and creek.

"The cause came on for trial, at the October Term, 1952, of the Osage County Circuit Court, and at the close of the state's case, the Court, dismissed the state's petition and dissolved the temporary restraining order; whereupon,

the state in due time filed motion for a new trial, later overruled, and notice of appeal, duly given and lodged in St. Louis Court of Appeals. However, before time to file transcript and brief the case, in the Appellate Court. It was agreed between the Prosecuting Attorney and the Commissioners of said Road district, (Board having changed in personnel, by an election), that the state was to let the case or the appeal die, in the Appellate Court, and that the new board of Commissioners would not attempt to erect the construction of the said alleged pre-emption, in accordance with this agreement, the appeal was suffered to die, 'For Failure', Etc. which it did, about Sept. 15, 1953. Mandate came down, of dismissal, costs adjudged against the plaintiff-State. Two cases of this nature are: State ex rel. Orear Pros. Atty Audrain County, vs. City of Vandalia, and State ex rel Peters vs. J. D. Franklin and the City of Linn, First is 119 App. Page 406, and latter is 133 App. page 486.

"My Problem is: Is the State, or the County of Osage liable for these costs? It of course is one or the other, surely. Your Opinion will be appreciated."

It seems clear to us that when you initiated the above-described action you were acting in behalf of the State, and that you were acting within your authority as Prosecuting Attorney.

In regard to this matter you direct your attention to the case of State ex rel. vs. Vandalia, 119 Mo.App.406. In that case the City of Vandalia, a fourth class city located in Audrain County, together with two individuals, Coontz and Waters erected in a public street in Vandalia "a large high platform and shed * * * sixty feet in length and about thirty-five feet in width * * *." The Prosecuting Attorney of Audrain County filed an action to abate a nuisance in which he requested the Court to order this structure removed. The Missouri Supreme Court held that in so acting the Prosecuting Attorney was acting in behalf of the State and was acting within his authority as Prosecuting Attorney. At l.c. 418-419 of its opinion the Court stated:

"* * * The Attorney General of the State, or the prosecuting attorney of the county in which the nuisance exists, may proceed in equity in behalf of the sovereignty of the state, for its abatement. This is the rule independent of any

statute touching the matter, as has been adjudged in many cases. (Smith v. McDowell, 148 Ill. 51, 22 L.R.S. 393; State v. Dayton, 36 Ohio St. 434; Hunt v. Railroad, 20 Ill.App. 282; People v. Beaudry, 91 Cal. 213, 220.) We apprehend that the right of those officials to interfere, grows out of the visitorial power of the State in respect to trusts of a public nature, and that the interference is akin to the suits in equity brought by attorney-generals for the regulation of public charities, which are frequently met with in the reports. (Atty. Gen. v. Haberdasher Co., 15 Beav. 307; Parker, Att. Commonwealth, v. May 5 Cush. (Mass.) 336.) The usual mode of proceeding in seeking relief respecting either charities for purprestures and other nuisances, is by an information in equity; which pleading corresponds nearly to a bill in equity filed by a private suitor for his own benefit. The information is in behalf of the sovereignty of the State, to redress some grievance of which the State may complain in equity on its own account, or on account of persons or interests under its special protection; like idiots, lunatics and charities. And informations in equity are filed by the officer representing the sovereignty of the State; that is to say, the Attorney General, or, in this commonwealth, some prosecuting attorney. This sort of information possesses most of the characteristics of a bill in equity and differs from the latter in form rather than in function. (1 Ency. Pl. and Pr., pp. 857, 859; Story, Eq. Pl., sec. 8; People v. Stratton 25 Cal. 242.) Some of the formal differences between the two are pointed out in the opinions in Atty. Gen. v. McIliter, 26 Mich. 444, 449, and Atty. Gen. v. Ewart B. Co., 34 Mich. 462, 472. The right of the prosecuting attorney of Audrain County to maintain the present proceeding is made clear by both ancient and modern decisions of equity courts and is supported by a statute of this State, which provides that whenever any property, real or personal, is held by a municipal corporation in a fiduciary capacity, the circuit court shall have jurisdiction of a proceeding instituted in the name of the Attorney General or prosecuting attorney to inquire into any breaches of trust, fraud or negligence and to administer proper relief.

Honorable John P. Peters

(R.S. 1899, sec. 6130). An inquiry into breaches of trust and fraud would naturally be conducted by a court of equity and according to equity pleading and practice. A pre-emption in a highway is a grievance of sufficient importance to justify its abatement at the instance of the State. (Att. Gen. v. Ewart B. Co., 34 Mich. 473; State v. Dayton; Hunt v. Railroad, People v. Beaudry, supra)."

You also direct our attention to the case of State vs. Franklin, 133 Mo.App. 486. In that case one Franklin erected, within the city limits of the city of Linn, which is within Osage County, on a public highway, a building which completely obstructed passage over that highway.

The Prosecuting Attorney of Osage County, instituted an action against Franklin to compel him to remove this obstruction. In its opinion the Missouri Supreme Court stated that such an action was brought in behalf of the State. At l.c. 491 of its opinion the Court stated:

"* * * The power over the public ways conferred by the laws of the State is in the nature of a trust which the municipality must execute in furtherance of the object of the trust, and where the municipality is guilty of a breach of this trust by acts either of commission or omission, the visitatorial right of the State empowers it to proceed in court to correct the abuse. This it may do through the arm of the Attorney-General or of the prosecuting attorney of the county wherein the nuisance is maintained, by suit in equity, or suit brought under section 6130, Revised Statutes 1899, which provides:

"'Whenever any property, real or personal, is held by any municipal corporation in a fiduciary capacity, the circuit court shall have jurisdiction upon proceedings instituted in the name of the Attorney-General or prosecuting attorney, to inquire into any breaches of trust, fraud or negligence, and to administer the proper relief.'
* * *"

Honorable John P. Peters

The case of State ex rel. vs. Lamb, 237 Mo. 437, was one in which the Prosecuting Attorney of Chariton County filed an action for injunction to suppress a nuisance. In holding that he acted on behalf of the State, the Missouri Supreme Court, at l.c.453 of its opinion, stated:

"It is clear that if the prosecuting attorney acts at all ex officio, he must act for and in behalf of the State. If he has power to act for the State, and institute proceedings at his discretion, as we think he has, then it follows that proceedings instituted by him of the character in question are in behalf of the State, and that no bond is required. It will not do to say that the prosecuting attorney may ex officio properly institute injunction proceedings in behalf of the State, and still be required to give bond. He has no right to institute the proceeding at all as prosecuting attorney unless he does so in behalf of the State. 'Acts of public officers acting on behalf of the State, within the limits of the authority conferred on them, and in the performance of their duties, are the acts of the State.' * * *."

In view of the similarity of the fact situation in your instant case to the fact situations in the cases cited, and in view of the fact that the cases cited sustain the proposition that a Prosecuting Attorney taking such action as you did take in the instant case, acts on behalf of the State and is within the scope of his authority in so doing, it is our opinion that in the instant case you acted within the scope of your authority as Prosecuting Attorney of Osage County, and that the action you brought was brought on behalf of the State and not on behalf of Osage County. Such being true, it is our further opinion that Osage County would not be liable for the costs in this case in any event, and that the only matter remaining for our determination is whether or not the State would be liable.

For light in this matter, we turn to the case of Murphy vs. Limpp, 147 S.W. (2d) 420. This was an action by one Murphy, Chairman of the Unemployment Compensation Commission of Missouri, against one Limpp, to collect contributions under the provisions of the Unemployment Compensation Law. A judgment for the defendant below was affirmed by the Missouri Supreme Court, but that part of the judgment sustaining costs against the appellant, Murphy, was reversed. At l.c. 423 of its opinion the Court stated:

Honorable John P. Peters

"The trial court entered a judgment for the costs incurred against appellants. This action was assigned as error, and appellants contend that the state is not liable for the costs in a case of this character. In 59 C.J., p. 332, Sec. 503, we read: 'It is a general and well established rule apart from statute that costs are not recoverable from a state, in her own courts, whether she has brought suit as plaintiff or has properly been sued as defendant; or whether she is successful or defeated. Therefore, absent a statutory provision, the costs were erroneously assessed against the state. Respondent cites Section 1255, R. S. 1929, Mo. St. Ann. Sec. 1255, p. 1476, but that section, as we read it, does not govern an action of this nature. Its provisions are expressly confined to actions on contracts by the state, such as bonds, etc.'"

From the above we conclude that costs cannot be assessed and collected against the State unless there is statutory provision to that effect. Such a provision was present, as was pointed out by the Court, in regard to the type of action stated in Section 1255, R. S. Mo. 1929, which is now Section 514.190 RSMo 1949. That section reads:

"In suits upon obligations, bonds, or other specialties, or on contracts, express or implied, made to or with the state, or the governor thereof, or any other person, to the use of the state, or to a county, or the use of a county, and not brought on the relation or in behalf or for the use of any private person, if the plaintiff shall recover any debt or damages, costs shall also be recovered as in other cases; but if such plaintiff suffer a discontinuance, or suit be dismissed, or non pressed, or if a verdict shall be found in favor of the defendant, he shall recover his costs."

Section 514.200, RSMo 1949, reads:

"In all such cases, the judgment against the state or county shall not be for costs generally, but the amount thereof shall be expressed in the judgment, and no such judgment shall afterwards be amended so as to increase the amount

Honorable John P. Peters

for which it was originally entered; and, upon a transcript of such judgment, together with a certified copy of the fee bill, showing the items of cost, being presented to the state auditor or the county court, the same shall be audited and allowed."

However, in the type of action instituted by you in the instant case we are unable to find any statutory provisions whereby the State is obligated to pay costs, and in such absence, in the light of the holding in the case of Murphy vs. Limpp, supra, we believe that the State is not so liable.

CONCLUSION

It is the opinion of this department:

- 1) That an action instituted by a Prosecuting Attorney, ex officio, for the abatement of an obstruction across a county road is an action brought by the State;
- 2) That although such action is unsuccessful by reason of adverse judgment or a discontinuance at any state of the proceedings no costs can be collected from the State;
- 3) In such a situation the county in which the action was begun would not be liable for such costs.

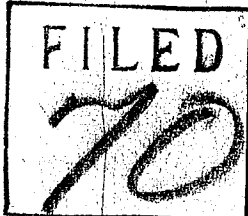
The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

MOTOR VEHICLE:
DRIVER'S LICENSE:
MUNICIPAL COURTS:
CIRCUIT COURTS:
DRUNKEN DRIVING:
RECKLESS DRIVING:

Circuit court cannot revoke, but may suspend, driver's license for violation of city ordinance. Record of such conviction sent to Director of Revenue. Director cannot revoke license because of conviction of violation of ordinance, but can suspend if person is "habitual violator".



April 1, 1954

Honorable Richard K. Phelps
Prosecuting Attorney
Jackson County,
Kansas City, Missouri

Dear Sir:

This is in answer to your letter of recent date, requesting an official opinion of this office, and reading as follows:

- "1. Does a Judge of the Circuit Court of Jackson County, Missouri, have the authority and power to revoke or suspend a driver's license for conviction under the city ordinances of Kansas City, Missouri for drunken driving or for reckless driving?
- "2. Is it a legal duty incumbent on the clerk of the court to forward to the office of the Director of Revenue of Jefferson City the record of conviction of a driver for drunken driving or reckless driving?
- "3. Does the Director of Revenue have the right and authority to revoke or suspend a drivers' license for conviction under the city ordinances of Kansas City, Missouri, for drunken or reckless driving?
- "4. When a driver is convicted in the Municipal Court of Kansas City, Missouri, for violation of the city ordinances relating to drunken driving and reckless driving and his driver's license has been suspended for such conviction does the Circuit Court on appeal from such conviction in a trial de novo, have authority to suspend or revoke the drivers' license if a conviction is had on said appeal?"

Honorable Richard K. Phelps

Subsection 3 of Section 302.225 reads as follows:

"No municipal court or municipal official shall have power to revoke any operator's license or chauffeur's license; but, in addition to all other jurisdiction heretofore given by law, the municipal court of any city of this state which now has or which may hereafter have more than three hundred thousand inhabitants shall have power and jurisdiction to suspend the license of any operator or chauffeur to operate a motor vehicle within the corporate limits of the municipality in which such offense was committed and where such municipal court otherwise has jurisdiction, for a period of not to exceed three months; such suspension shall be ordered only for any of the causes given in sections 302.271 and 302.281 authorizing revocation and suspension of licenses by the director."

It is clear from the provisions of such subsection that no authority exists in the municipal court of a city of over three hundred thousand inhabitants, of which Kansas City is one, to revoke a driver's license, but such court may, for the causes contained in Section 302.271 and 302.281, L. of Mo. 1951, p. 678, suspend the license of an operator or chauffeur to operate motor vehicles within the corporate limits of such municipality for a period not in excess of three months.

The power of the circuit court on appeal is no greater than the power of the municipal court wherein prosecutions for violations of ordinances must be initiated.

Section 302.271, L. of Mo. 1951, p. 678, provides in part as follows:

"The director shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction of any of the following offenses, when such conviction has become final:

"(2) Driving a motor vehicle under the influence of intoxicating liquor or a narcotic drug;

Honorable Richard K. Phelps

"(6) Conviction, or forfeiture of bail not vacated, upon three charges of careless or reckless driving committed within a period of two years."

Since drunken driving and reckless driving are "causes given in Section 302.271," the judge of a circuit court in a city of over three hundred thousand has the power to suspend a driver's license within the confines of the municipality for not to exceed three months, where a conviction is had on appeal in such circuit court for a violation of a municipal ordinance relating to drunken driving and to suspend the license of a person convicted for a third time within two years of a violation of a city ordinance relating to reckless driving, when such case has been appealed.

We do not believe that the provisions of Subsection 4 of Section 302.225, L. of Mo., 1951, p. 678, which provides as follows:

"4. The magistrate courts of each county and the circuit courts of the various counties of this state shall have power to suspend for the causes herein provided for a period not to exceed one year the license of any operator or chauffeur to operate a motor vehicle within the entire state, and any circuit court or magistrate court may revoke for the causes herein provided the license of any such operator or chauffeur to operate a motor vehicle within this state, whether the case is on appeal or has originated in such court."

is any authority for holding that a circuit court may revoke or suspend for a year a driver's license because of a violation of city ordinances.

Subsection 2 of Section 302.225, L. of Mo. 1951, p. 678, provides as follows:

"Every court having jurisdiction over offenses committed under this chapter, or any other law of this state or municipal ordinance regulating the operation of vehicles on highways shall within ten days thereafter forward to the director upon forms to be furnished by the director a record of the conviction of any person in said court for a violation of any of said laws or ordinances other than nonmoving traffic violations, together with the record of any action taken by the court

Honorable Richard K. Phelps

in suspending or revoking the license of such person."

We believe it is clear from the provisions of Subsection 2 of Section 302.225 that it is the duty of the circuit court to see that there is forwarded to the Director of Revenue a record of the conviction of any person in such court for violating city ordinances relating to drunken driving and reckless driving within ten days after his conviction becomes final.

With regard to your third question, we are enclosing an official opinion of this office rendered under date of March 31, 1954, to M. E. Morris, which opinion we believe answers such question. However, it is to be noted that under the provisions of Section 302.281, L. of Mo. 1951, p. 678, provision is made for the suspension of a driver's license by the Director of Revenue if such person "is an habitual violator of traffic laws."

Subsection 8 of Section 302.010, L. of Mo. 1951, p. 678, defines an habitual traffic violator as "a person who has been adjudged guilty at least five times within one year of violating any traffic laws or ordinances other than nonmoving traffic violations;".

Of course, any person who was convicted five times within one year of violating municipal ordinances relating to drunken driving or reckless driving would be an habitual violator of traffic laws, and his driver's license would be suspended by the Director of Revenue under the provisions of Section 302.281.

CONCLUSION

It is the opinion of this office that the circuit court of Jackson County does not have authority to revoke a driver's license when the driver has been convicted on appeal in such court for the violation of city ordinances of Kansas City relating to driving while intoxicated or reckless driving.

Such court may suspend the driver's license to operate in the municipality for a period not in excess of three months for a conviction of violating a city ordinance relating to drunken driving, or may suspend the license to operate within the municipality not in excess of three months for a third conviction within two years of the violation of a city ordinance relating

Honorable Richard K. Phelps

to reckless driving.

It is the duty of the circuit court to forward to the Director of Revenue of Missouri a record of all convictions in such court on appeal from the municipal court of Kansas City for violations of city ordinances relating to drunken driving and reckless driving.

The Director of Revenue does not have the authority to revoke a driver's license because of a conviction of violating the city ordinances of Kansas City relating to drunken or reckless driving. The Director of Revenue can suspend, for not to exceed one year, the driver's license of a person convicted of violating city ordinances of Kansas City relating to drunken driving or reckless driving, when five such convictions have been obtained against such person within the period of one year.

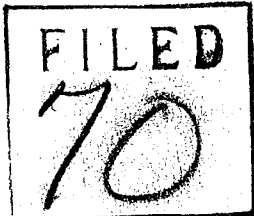
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. C. B. Burns, Jr.

Very truly yours,

CBB/ld

JOHN M. DALTON
Attorney General

ELECTIONS: ELECTION PRECINCTS: (1) County court has exclusive jurisdiction to establish boundaries of election precincts for general, primary and special elections. (2) Elector may vote at any established precinct within the township of his residence, if such elector reside outside corporate limits of municipality.



April 26, 1954

Honorable Hugh Phillips
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"I wish to make a request for an opinion to be given by your office. To facilitate matters, I will give a brief background of the situation leading up to the question:

"Camdenton is a city of the fourth class with three established wards for city elections. It is located in the municipal township of Osage, and at present there are four election precincts for primary and general elections in Osage Township. Ordinarily, twenty-five to thirty percent of the total vote cast in Camden County at either the primary or general election is cast at the Osage Township precinct located in Camdenton at the Court House. My questions are as follows:

"1. Is the County Court of Camden County required to establish one voting precinct for primary and general elections in each ward of Camdenton, Missouri?

Honorable Hugh Phillips

"2. If the establishment of such precincts is required, at what precinct do those voters living outside the city limits cast their votes?"

With respect to your first question we direct your attention to Section 111.220, RSMo 1949, reading as follows:

"The county courts of the several counties in this state shall have power to divide any township in their respective counties into two or more election districts, or to establish two or more election precincts in any township, and to alter such election districts and precincts, from time to time, as the convenience of the inhabitants may require."

You will observe that under the provisions of this statute the county court is authorized to divide any township into two or more election districts within their discretion. The establishment of particular districts, of course, is to be governed by necessity and convenience of the electorate. We do not find any statute requiring such districts to be located specifically with respect to the boundaries of a municipality or part of a municipality included within the boundaries of such election district. Therefore, as the power conferred upon the county court is discretionary, we believe that it is not required that such body establish any election district with reference to the boundaries of any municipality or part of municipality included therein.

Having answered your first question in the negative it is perhaps unnecessary to give further consideration to the second question. However, in the event that the county court of Camden County should establish an election district or districts including a portion or all of the City of Camden and designate a polling place or polling places therein, we deem it advisable to extend this opinion to answer your second question. In this regard we direct your attention to a portion of Section 111.060, RSMo 1949, detailing the qualifications of voters and including the following provisions:

Honorable Hugh Phillips

" * * * Each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides.
* * *" (Emphasis ours.)

From the quoted provisions it is clear that a person residing outside the city limits may vote at any polling place established in the township wherein he resides.

CONCLUSION

In the premises we are of the opinion:

(1) That the county court of each county has the discretion to divide each township of such county into two or more election districts or election precincts under the provisions of Section 111.220; and that without regard to the geographical boundaries of any municipality or part of municipality located in such township; and,

(2) That persons residing outside the corporate limits of a municipality may vote at any polling place established for the conduct of elections within such township.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

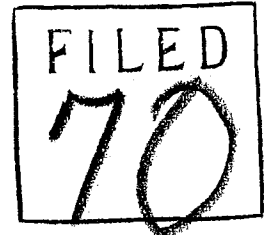
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**SCHOOL DISTRICT ELECTION:
ABSENTEE BALLOTS:**

Section 7, of Article VIII, of the Constitution of Missouri, authorizes the Missouri Legislature to enact laws providing that absentee ballots may be cast in school elections. Also that the control of elections for directors in the first election held in a reorganized district is under the control of the county board of education; that all subsequent elections are under the control of the district board of education, and that these boards are the proper bodies to issue absentee ballots; also that absentee ballots should not be rendered in a school district election by the county superintendent of schools in any instance. When such ballots are issued by the county superintendent of schools, such issuance is improper but that it does not nullify such absentee ballots when they are properly cast, and that under such circumstances such absentee ballots should be counted, just as though they had been issued by the proper party.

June 10, 1954

Honorable John P. Peters
Prosecuting Attorney
Osage County
Linn, Missouri



Dear Sir:

Your recent request for an official opinion reads as follows:

"I have been requested to obtain from you an opinion concerning absent voting at a school election in our Reorganized School District Numbered two (2) of Osage County, with reference to the Election of School Directors, that being the proposition upon which their choice of candidates was expressed by ten 'Absent Voters' in our recent school election here April 6th. I will ask a few direct abstract questions first:

"1. Is our Constitution, and the provision therein, relative to 'Suffrage and Elections, and especially Section 7 of Article VIII, thereof, broad enough to and does it, authorize the law making body of our state to make provision for absent voting at School Elections?

"2. Has our legislature, and by the various sections of Chapter 112, R.S.Mo. 1949, 112.010 to and including 112.410 inclusive, authorized absent voting for election of directors at School elections?

"3. In our recent school election here there were 10 absentee votes, as I am informed, cast in the following manner; that is to say, applications for the blanks on which to make application for a ballot to be cast as an absentee ballot, were made to the Superintendent of Schools, who had supplied himself with forms used in County Elections, from the office of the County Clerk, (I am presuming that envelopes in which to mail them were also procured from the Clerk), some

Honorable John P. Peters

of these applications, for the blanks on which to make application, and a ballot, to the said superintendent, were orally and in person and some were requested by mail, and in each case the blank and ballot were furnished to the prospective voter, by said superintendent.

"4. The voted ballots, with choice of their candidates, and the verified applications therefor, were returned by U. S. Mail, to the Secretary of the School board, who in turn, delivered them to a canvassing board (I will call it) of 4 persons, who had been appointed by the acting president of the school board for that purpose.

"Now; The premises fully considered, in your opinion were these legally cast ballots, to be properly counted, and under all circumstances, including their return, and to the official returned, and properly counted, for the candidate for director for which they were cast?"

1.

It is my opinion that Section 7 of Article VIII of the Constitution of Missouri is broad enough to authorize the Missouri Legislature to enact laws authorizing absentee voting at school elections. This is in answer to your first question.

2.

Your second question is whether Chapter 112 RSMo 1949, authorizes absentee voting in an election held for the purpose of electing school directors. In this regard we direct attention to Section 112.010 RSMo 1949, which reads:

"Any person being a duly qualified elector of the state of Missouri, other than a person in military or naval service, who expects to be absent from the county in which he is a qualified elector on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, or any person who through illness or physical disability expects to be prevented from personally going to the polls to vote on election day, may vote at such election as herein provided."

Honorable John P. Peters

I believe that an election held for the purpose of electing school directors clearly is an election held within a "district" as provided above. I believe also that such an election is a "general election", when held at a regular time set by statute each year, or a "special election", when not so held, which is the case at the first organization election, within the meaning of Section 112.010, supra.

In the case of *Dysart v. City of St. Louis*, 11 S.W.(2d) 1045, at l.c. 1052, the court in its opinion stated:

"* * * But the definition of 'general election' is settled by an amendment to the Constitution adopted in 1920 (see Laws 1921, p. 703), by which section 12 of article 10 was repealed, and another section by the same number adopted. It provides:

"No county, city, town, township, school district or other political * * * subdivision of the State shall * * * become indebted,' except by a two-thirds vote at an election held for that purpose; and, 'such proposition may be submitted at any election, general or special.'

"It follows that any local election, city, county, etc., may be either general or special, and this wipes out the definition of 'general election' in section 7058, or limits the implied distinction to state elections.

"It necessarily means that a special election is one called for a special purpose, not one fixed by law to occur at regular intervals. A primary election and a regular election are connected together in section 35 in regard to general registration, with the same requirement for a revision before a primary election as there is before a final election to elect officers. Therefore it avails nothing to distinguish a primary election from the statutory definition of any other general elections.* * *"

It seems clear, therefore, that since an election held to elect school district directors is a general election, or a special election, as the case may be, held within a district, that, according to Section 112.010, supra, absentee ballots may be cast at such an election.

3.*

You next state, simply as a matter of fact, that these absentee ballots were issued by the county superintendent of schools. In this regard we direct your attention to Section 165.687 RSMo 1949, which

Honorable John P. Peters

reads:

"If the proposal to form such enlarged district has received a majority of the votes cast on such proposition the county board of education shall order an election in such enlarged district, at a time and place or places to be fixed by the county board of education, not more than thirty days after the date of the election when such enlarged district was formed, for the purposes of electing six directors in such enlarged district. The election shall be conducted in the manner as provided by section 165.330. Until such time as a majority of the district board members of the enlarged district are elected and qualified, the county board of education shall perform such duties with respect to conducting the election as would be performed by the district board of education were it in existence, but the costs of election shall be paid from the incidental fund of the enlarged district. Two directors shall be elected to serve until the next annual school election, two to serve until the second annual school election, and two to serve until the third annual school election. After the expiration of the initial terms, members elected shall serve for three years. The directors above provided shall be governed by the laws applicable to six-director school districts."

From the above it seems plain that the first election held in the reorganized district has to be conducted by the county board of education, and that all subsequent elections are to be conducted by the district board of education. Therefore, it would seem that the county board of education is the proper body to furnish absentee ballots in the first election, and the district board in all subsequent elections, but that in no instance is the county superintendent of schools the proper person to do this. However, in your case, the county superintendent of schools did furnish these ballots. Our problem, therefore, is the effect of this impropriety upon the validity of the absentee ballots when cast.

So far as appears from your letter, the method of applying for absentee ballots (Section 112.020 RSMo 1949) was substantially complied with; there is no indication that any person who voted an absentee ballot was not entitled to do so; the absentee ballots were returned to the proper party, and were, so far as appears, properly counted. In brief, it seems that the entire procedure was proper, except for the fact that the wrong party issued the ballots. Will this render void these absentee ballots? In this regard we note that so far as appears there is no statutory or case law which either states or implies that such an irregularity will render the absentee ballots null. We also note the fact that the whole tendency of

Honorable John P. Peters

of the law is to construe election laws liberally in favor of the right of suffrage.

In an opinion rendered August 9, 1950, to Honorable Albert D. Nipper, Prosecuting Attorney of Washington County, this department held:

"Therefore, it is the opinion of this department that an absentee ballot cast by a person legally entitled to vote the same may be counted, although the county clerk might have solicited the application from the voter, taken the application from the voter at his home, and at the same time furnished the ballot, and upon its being voted has accepted it and has either returned it to the original county or has taken it and mailed the same to the clerk's office.

"We are further of the opinion that the fact that no list of applicants for absentee ballots has been posted as required by Section 112.03, House Bill No. 2050, Sixty-fifth General Assembly, does not render invalid such voter's ballot, and that such ballot may be counted. We are further of the opinion that such ballot may be counted although a particular applicant's name has been omitted from the list, although his postoffice address is not given, or although his street address is not given. We are further of the opinion that after ballots are deposited in the clerk's hands, they can lawfully be counted, although no list of voters is posted as required by Section 112.06, House Bill No. 2050, Sixty-fifth General Assembly, or where the name of a particular voter has been omitted from such list."

In an opinion (a copy of which is enclosed) rendered by this department on October 21, 1952, to Honorable Robert L. Hey, Prosecuting Attorney of Saline County, we held:

"Therefore, it is the opinion of this office that an absentee ballot cast by a person legally entitled to vote the same may be counted although such ballot may have been obtained more than thirty days prior to the election, Section 112.020, RSMo 1949, relating to time of application being directory only."

In view of the above, and of the further fact that the persons who cast absentee ballots in the instant election appear to have been entitled to do so, we do not feel that their vote should be nullified because of the mistakes of others.

Honorable John P. Peters

CONCLUSION

It is the opinion of this department that Section 7, of Article VIII, of the Constitution of Missouri, authorizes the Missouri Legislature to enact laws providing that absentee ballots may be cast in school elections.

It is the further opinion of this department that the control of elections for directors in the first election held in a reorganized district is under the control of the county board of education; that all subsequent elections are under the control of the district board of education, and that these boards are the proper bodies to issue absentee ballots; also that absentee ballots should not be supplied in a school district election by the county superintendent of schools in any instance.

It is our further opinion that when such ballots are issued by the county superintendent of schools that such issuance is improper, but that it does not nullify such absentee ballots when they are properly cast, and that under such circumstances such absentee ballots should be counted, just as though they had been issued by the proper party.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

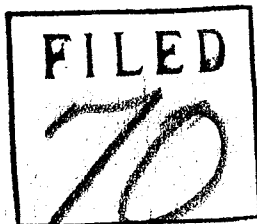
Very truly yours,

HPW/ld

enc. (1)
Opn. Robert L. Hoy,
10-21-52

JOHN M. DALTON
Attorney General

PUBLIC NOTICES: Maximum rate for publication of public notices on behalf of state or county is ten cents per column line of two inches length, twelve lines per column inch, in the absence of law authorizing or requiring use of larger type, wider spacing of lines or incorporation of emblems.



June 24, 1954

Honorable John P. Peters
Prosecuting Attorney
Osage County
Linn, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"Will your honorable department please give me an opinion, as to whether or not, under the provisions of Section 493.030, the charges, marked on each of the Clippings enclosed, can be sustained, as a legal charge under the section cited R. S. Mo. 1949? You will note the difference in the charge of the two papers, one representing each Political Party here in the County. The one, Single Column, seven inches in space, published 4 times, charge \$56.00. The other, Double Space, 8½ inches, or total of single space 17 inches, 4 issues - charge \$68.00.

"As I read the section quoted, the maximum that can be charged is not over \$1.00 per inch, but this maximum contemplates, the type, designated in this section of the

Honorable John P. Peters

law, as I understand it, that is 'Six Point', is this interpretation, in your opinion correct?

"Further, under the terms of and looking at the proviso, beginning in line 11 top right, is there some other provision of the law, relative the same subject, that fits this proviso portion of the statute, or is this an abstract provision to fit a special order, that might be made by copy or description, furnished, with request that it be so printed? It would seem that the first part of the proviso requires, that there should first be some law, authorizing or requiring the different size of type, and form of the notice, which would go to make up and determine, the space charged for.

"Lastly; can the charge set out on either of the two notices submitted, be sustained under the section of law, cited above?

"Your opinion will be appreciated."

You have submitted with your letter of inquiry the clippings referred to therein. We observe from such clippings that they are notices of the primary election to be held on the third day of August, 1954. This publication has been made by the county clerk pursuant to the provisions of Section 120.330, RSMo 1949, reading as follows:

"Upon receipt of such notice, such county clerk shall, not less than ten days thereafter, publish so much thereof as may be applicable to his county, once each week, for four consecutive weeks, in at least two, and not to exceed four, newspapers of general circulation published in said county."

The expense of such publication is made a liability of the county under the provisions of Section 493.020, RSMo 1949, which reads as follows:

Honorable John P. Peters

"When any such advertisement shall be made by a public officer, thereunto authorized by law, the reasonable expense thereof shall be allowed and paid out of the county treasury, as other demands and charges of a like nature."

The statutory maximum rates which may be charged for the publication of public notices have been established by Section 493.030, RSMo 1949, which reads as follows:

"When any law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice shall be published in any newspaper for the state, or for any public officer on account of or in the name of the state, or for any county, or for any public officer on account of, or in the name of any county, there shall not be charged by or allowed to any such newspaper for such publications a higher rate than ten cents per line for each insertion, the lines to be two inches long and to be set in type occupying twelve lines to the column inch, fractional lines to be charged and paid for as one line; provided, however, that where any law authorizing and requiring the publication of any such law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice, shall require the use of a type having a body larger than six point, or more than one size of type, or the use of any emblem, or the spacing of lines so as to have a blank space between the lines, said printing shall be paid for by the inch of space used, single column of twelve ems pica wide, which price per inch shall not exceed the rate of one dollar per inch, single column of twelve ems pica wide, for each insertion. When any law, proclamation, advertisement,

Honorable John P. Peters

nominations to office, proposed constitutional amendments, or other questions to be submitted to the people, order or notice, shall be required by law to be published in any newspaper, the rates herein specified shall prevail, and all laws or parts of laws in conflict herewith, except sections 493.070 to 493.090, are hereby repealed." (Emphasis ours.)

You will observe that under the first portion of this statute the maximum rate which may be charged for such publications has been fixed at ten cents per line for each insertion. "Line" as used in the statute has been defined as being one of two inches in length and set in a type occupying twelve of such lines to the column inch. This is the maximum which may be charged in the absence of certain qualifying provisions found in the same statute.

It is noted that in the event a law authorizing or requiring the publication of certain types of informative material for the benefit of the public requires that type of a different size be used, or the use of blank spaces between lines, or the incorporation of emblems, a different maximum rate may be charged. In such circumstances the maximum rate for publication shall be based upon the inch of space used by a single column of twelve picas wide. The rate so fixed for such type of publication may not exceed \$1.00 per column inch for each insertion. However, this latter rate is inapplicable to notices such as those now under consideration inasmuch as the statute requiring the publication thereof makes no requirement so as to bring the publication within the proviso found in the statute.

The foregoing rates, of course, are the maximum which may be lawfully charged by the newspaper publishing the notice. It is made the duty of the officers procuring such publications to obtain the best rate obtainable within such maximums as provided by Section 493.040, RSMo 1949, which reads as follows:

"In procuring the publication of any law, proclamation, advertisement, order or notice, as in section 493.030 mentioned, the public officers shall accept of the most advantageous terms that can be obtained, not exceeding the rates limited in said section."

Honorable John P. Peters

It might also be well to point out that an agreement between two or more publishers to charge the highest legal rate is immoral and not enforceable as was held in *Pendleton v. Asbury*, 78 S.W. 51, 104 Mo. App. 723.

CONCLUSION

In the premises we are of the opinion that the maximum legal rate which may be charged for the publication of the notice of a primary election is that fixed by Section 493.030, RSMo 1949, being ten cents per line for each insertion, each line being two inches long and set in type occupying twelve lines to the column inch with fractional lines being charged for as a whole line.

It is our further opinion that the charges which you have indicated upon the two clippings submitted, amounting to \$56.00 and \$68.00 respectively, are both in excess of the maximum legal rate which may be charged for the publication of the notice to which they relate.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

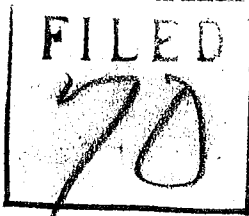
Yours very truly,

JOHN M. DALTON
Attorney General

WFB:vlw

ELECTIONS: BALLOTS:
COUNTY CLERKS:

Neither county clerk nor election officials have authority to remove candidate's name from primary election ballot once such ballot is finally printed. Notice of withdrawal of candidate received by county clerk too late to prevent candidate's name from appearing on printed ballot is ineffective.



July 29, 1954

Honorable John P. Peters
Prosecuting Attorney
Osage County
Linn, Missouri

Dear Mr. Peters:

This is in response to your request for opinion dated July 27, 1954, which reads as follows:

"Under date July 23, our County Clerk Mr. Rudolph Nilges received the following telegram, from Secretary of State, Walter H. Toberman:

"Rudolph Nilges
County Clerk,
Linn, Missouri.

"Withdraw name of Francis E. Howard Ironton, Missouri as a candidate for representative in Congress, on the Republican ticket for the eighth Congressional district. Formal notice follows."

"Then on same date, formal notice was mailed to our Clerk, by Secretary of State, Toberman, authorizing him to withdraw the name of Mr. Howard, as a candidate for the office named, from the list of candidates, on the Republican ticket certified to him on May 3rd, 1954 stating that 'formal withdrawal' was certified, to his office on July 23rd, 1954.

Honorable John P. Peters

"The ballots were all printed, on the date these communications were received, some absentees had voted, others applied for and mailed out, including 'War ballots.'

"In your opinion, what is now the proper procedure, to be followed by our County Clerk, and or Judges of Election, as for instance, should the Clerk scratch out the name, cover it with a sticker, or leave this to the judges of election, or leave the ballots as they are, on the theory that Mr. Francis' withdrawal, has not been legally accomplished.

"A prompt reply will be much appreciated by our officers concerned."

Underlying your request is the basic question of the time limit in which a person who has filed a declaration of candidacy for the primary election may withdraw such candidacy.

We have previously held in an opinion rendered to the Honorable Lawson Romjue, Prosecuting Attorney of Macon County, under date of July 28th, 1954, copy enclosed, that Section 120.-230, RSMo Cum. Supp. 1953, has no reference to a withdrawal of a candidate who has filed a declaration of candidacy. That being so, there is no statute specifying the time within which such a candidate may effectively withdraw.

The time within which such a candidate may withdraw then must be determined from the statutory mechanics of the primary election process and the statutory authority and duties of those charged with various functions in carrying out this process.

Section 120.440, RSMo 1949, specifies that at least forty days before the August Primary, the county clerk shall cause sample ballots to be printed, specifying the manner thereof, and submit such ticket of each party to the county chairman thereof, mail a copy to each candidate, and post a copy in a conspicuous place in his office. On or before the tenth day preceding the primary he "shall correct any errors or omissions in the ballots and cause the same to be printed and distributed, as required by law in the case of ballots for the general election" with an exception as to the number of ballots to be furnished each precinct.

That the county clerk may correct errors in the sample ballot before it is finally printed is well-established. Mansur

Honorable John P. Peters

v. Morris, 355 Mo. 424, 196 S.W. 2d 287; State ex rel. Chilcutt v. Thatch, 359 Mo. 122, 221 S.W. 2d 172, 175. The kind of errors which the county clerk may correct was considered in the Mansur case and other cases cited therein with the conclusion that the word "error" was broader than mere "mistake" or "irregularity" and is not confined to mere clerical errors, such as misspelled names, etc. From these cases we believe it is clear that a county clerk can remove the name of a candidate from the sample ballot before the ballot is finally printed, because to include it thereon after a candidate has withdrawn would be erroneous.

With regard to the correction of errors on the sample ballot the duties of the county clerk are discretionary although not judicial. However, his only duty after the ballots are printed is to cause them to be delivered to the judges of the election of each election district by the sheriff of the county or his deputy (Section 111.480, RSMo 1949.) This duty would appear to be purely ministerial.

We find no law which would authorize the county clerk to obliterate or remove from the ballot by any method the name of any candidate, once the ballots have been finally printed. As stated above, once they have been printed his only duty is to see that they are properly delivered. Nor do the statutes grant any such authority to any other election official.

Therefore, because of the mechanics of the primary election process, and the duties of the county clerk and other election officials with regard to primary elections, we believe it is clear that a person who has filed a declaration of candidacy may withdraw his candidacy at any time before the ballots are finally printed provided notice of his withdrawal is received by the county clerk in sufficient time for the county clerk to prevent his name from appearing on the printed ballot, but not thereafter.

Therefore, the ballots in question should be delivered as printed without any obliteration of this candidate's name, because neither the county clerk nor any other election official has the authority to remove his name from the printed ballot, and he has not, therefore, validly effected a withdrawal.

CONCLUSION

It is the opinion of this office that once the primary election ballots are finally printed, neither the county clerk

Honorable John P. Peters

nor any other election official has the authority to remove the candidate's name therefrom, and that notice of withdrawal received by the county clerk too late to prevent this candidate's name from appearing on the printed ballot is ineffective. Under such circumstances the ballots should be delivered as printed without any obliteration, change or defacement in any manner by anyone.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:vlw

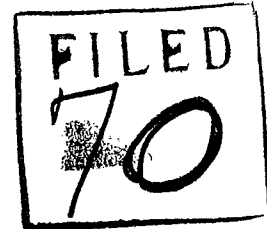
Enclosure - Opn. Lawson Romjue
7-28-54

CITY:
BOARD OF CURATORS:
SEWER SYSTEM:
WATER SYSTEM:
UNIVERSITY OF MISSOURI:
ROLLA SCHOOL OF MINES AND
METALLURGY:

The City of Columbia may exact a reasonable charge from The Curators of the University of Missouri for the use of the Columbia sewerage system by the University of Missouri, said city may refuse to permit the University to use the City's sewerage system if reasonable charges made therefor are not paid. The foregoing is applicable to the City of Rolla and the School of Mines and Metallurgy.

.....
August 25, 1954

Honorable Paul M. Peterson
Attorney for
The Curators of the University
of Missouri
Columbia, Missouri



Dear Mr. Peterson:

By letter dated July 20, 1954, you requested an official opinion as follows:

"Request is hereby made by the Curators of the University of Missouri for an opinion of your office based upon the following facts:

"1. The Curators of the University of Missouri is a public corporation organized under the provisions of Sec. 172.020 RSMo 1949.

"2. The City of Columbia, Missouri is a constitutional **charter** city.

"3. Pursuant to Chapter 250 RSMo 1949 an election was called and the issuance of \$1,300,000 revenue bonds was authorized for the purpose of extending and improving the city sewer system.

"4. The City proposes to enact an ordinance fixing a charge upon all persons and corporations, including The Curators of the University of Missouri, using the city sewer system. The charge will be based primarily upon the amount of water metered to the user, making allowances upon an estimated basis for the water metered to the user which will not be turned into the city sewers. The fee or charge will be uniform upon all users

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of the sewer system, but the amount of credit that may be given for water which it is established will not be turned into the city sewers will vary in the case of various users.

"5. The proposed ordinance will provide that in those cases where water is obtained from sources other than the city water supply, or where a part of the water is obtained from sources other than the city, the user shall furnish records showing the amount of water used from such other sources, and the charge will then be made to such user in the same method as where all of the water is furnished by the city. The rates charged in such cases will be the same as the rates charged where the city furnishes all of the water on which the sewer charge is based.

"6. In all cases, the charges for the use of the sewers will be graduated upon the number of cubic feet estimated to be turned into the sewers by the user.

"7. The major portion of the water used by the University of Missouri is furnished from wells owned and operated by the University. A small portion of the water used by the University is purchased from the City of Columbia and metered to it as to other users. It is possible to meter the water pumped from the University wells for use by the University. The amount of water turned into the sewers by the University can only be estimated taking into consideration the various uses of water by the University where the water is not turned into the public sewers.

"8. The Curators of the University of Missouri has, since the establishment of the city sewer system, used the city sewers exclusively for the disposition of the sewage of the University, and no charge

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has heretofore been made upon it for the use of the city sewer system.

"The Curators of the University of Missouri request your opinion as to whether the City of Columbia may, in the manner above set out, legally charge and collect from it reasonable charges for its use of the city sewers and whether the city may refuse The Curators of the University of Missouri the right to use the city sewer system if said charges are not paid.

"The City of Rolla, a city of the fourth class created under general law, has authorized the issuance of \$300,000 in revenue bonds for the construction of a new sewer system in that city, and proposes under procedure similar to that outlined above to charge The Curators of the University of Missouri a fee for the use of the city sewers by the School of Mines and Metallurgy located at Rolla.

"It is requested that your opinion cover the legal right of the City of Rolla to make charges against The Curators of the University of Missouri for use of the Rolla sewer system and its right to refuse The Curators of the University of Missouri the right to use the city sewer system if said charges are not paid."

All statutory citations herein are RSMo, Cumulative Supplement, 1953, unless otherwise specified.

Section 250.010 authorizes cities to extend and improve their sewer systems. Said section reads:

"1. In addition to all powers granted by law and now possessed by cities, towns and villages in this state for the protection of the public health, any city, town or village, whether organized under the general law or by special charter or constitutional charter, and any sewer district organized under chapter 249, RSMo, as that chapter now exists, or as it may be amended, is

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hereby authorized to acquire, construct, improve or extend and to maintain and operate a sewerage system and to provide funds for the payment of the cost of such acquisition, construction, improvement or extension and operation as hereinafter provided. Such sewerage system may be constructed and operated either within or without the corporate boundaries of any such city, town or village or sewer district.

"2. When used in this chapter the term 'sewerage system' shall mean and include any or all of the following:

"(1) Sewerage systems and sewerage treatment plants, with all appurtenances necessary, useful, and convenient for the collection, treatment, purification and disposal in a sanitary manner of the liquid and solid waste, sewage, and domestic and industrial waste of any such municipality; and

"(2) Shall include combined storm water and sanitary systems;

"(3) The term shall also mean and include the construction of such storm water sewers as, in the judgment of the governing body of any such city, town or village or sewer district, may be necessary or desirable in order to relieve sewers carrying sanitary and storm water loads of undue loads or in order to permit the efficient operation of any such sanitary sewers for the collection, treatment and disposal of sewage and domestic or industrial waste including combined storms and sanitary sewerage system."

Chapter 250 further provides for issuance of revenue bonds to defray the cost of such improvement and extension. The constitutionality of this chapter was vigorously, but unsuccessfully, attacked in *City of Maryville vs. Cushman*, 249 S.W. (2d) 347. See also *City of Sikeston vs. Sisson*, 249 S.W. (2d) 345.

Your first question is whether the City of Columbia can make a reasonable charge for the use of its sewer system by the University. The City is required by Section

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250.120 to make and collect charges for the use of the system. Since the University is exempted from taxation by Article X, Section 6, Constitution of Missouri, 1945, and Section 137.100, RSMo 1949, it might be contended that the charges made for the use of the sewerage system are taxes, and the University is thus exempted. However, such charges are declared by the Supreme Court of Missouri to be charges for a service rendered, and not taxes. City of Maryville vs. Cushman, 249 S.W. (2d) 347, 353, and cases therein cited. It can make no difference that the City had not heretofore charged for the use of the sewerage system. (City of Maryville vs. Cushman, supra.)

Your next question is whether the City can collect from the University the amount of such charges. We assume that you wish to know if the City can, by an action at law, enforce payment by the University if it refuses to pay. The University is made a corporation to be known as "The Curators of the University of Missouri" by Section 172.020, RSMo 1949, and is given the power to sue and be sued in contract actions. Todd vs. Curators of the University of Missouri, 347 Mo. 460, 147 S.W. (2d) 1063. Since the rendering of sewerage services would be in the nature of a contract we conclude that the University could be sued for non-payment of charges by it.

Your next question is whether the City may refuse the University the right to use the City's sewers if the charges for the use thereof are not paid. We assume that the refusal to pay will not be based upon a dispute as to the proper amount of the charge, but based upon doubt of the power of the University to pay such charges.

Further powers are given to cities by Section 250.240 which reads as follows:

"It is the purpose of this chapter to enable cities, towns and villages and sewer districts to protect the public health and welfare by preventing or abating the pollution of water and creating means for supplying wholesome water, and to these ends every such municipality and sewer district shall have the power to do all things necessary or convenient to carry out such purpose, in addition to the powers conferred in this chapter. This chapter

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is remedial in nature and the powers hereby granted shall be liberally construed."

We conclude that the power to discontinue sewerage services to persons who do not pay the charges therefor is a power both necessary and convenient to the operation of the sewerage system on a sound financial basis. Therefore, the City of Columbia is given such power by Section 250.240.

Since the School of Mines and Metallurgy is a department of the University (Section 172.430, RSMo 1949), and the City of Rolla is a City within the meaning and intent of Section 250.010, what is said in this opinion is applicable to said School of Mines and Metallurgy and the City of Rolla.

CONCLUSION

In the premises, therefore, it is the opinion of this office that the City of Columbia may exact a reasonable charge from The Curators of the University of Missouri for the use of the Columbia sewerage system by the University of Missouri, and that said City may refuse to permit the University to use the City's sewerage system if reasonable charges made therefor are not paid.

The foregoing is applicable to the City of Rolla and the School of Mines and Metallurgy.

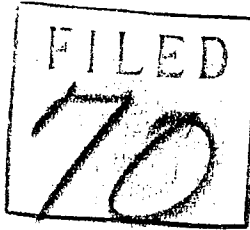
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

PMcG:irk

JOHN M. DALTON
Attorney General

COUNTY HOSPITAL TRUSTEES: : Newly elected County Hospital Trustees
: should qualify and take over their of-
When inducted into office:: fices under the terms of Section
: 205.190, RSMo 1949, and should not
: wait until the first of January
: following, to take office.
.....



December 1, 1954

Honorable Elmer Peal
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri

Dear Mr. Peal:

We are here supplying the opinion which you have requested whether newly elected County Hospital Trustees are to assume office after the November election or on January 1st following the election. Your letter requesting an opinion on this subject reads as follows:

"I will appreciate your advice as to when newly elected County Hospital Trustees are to take office. I am not sure if it is after the November election or January 1st.

"I wish to thank you for your advice, I am,"

Section 205.160, RSMo 1949, provides for the establishment and maintenance of public county hospitals in the several counties of this State. Said section reads as follows:

"The county courts of the several counties of this state are hereby authorized, as provided in sections 205.160 to 205.340, to establish, construct, equip, improve, extend, repair and maintain public hospitals, and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties."

Section 205.170, RSMo 1949, provides for the creation by the County Court of a Board of Trustees for a hospital

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in any county of this State having established a public county hospital as a unit of the County Health and Welfare Programs, initially, by the appointment of such Trustees, five in number, who shall hold their offices until the next following general election. Thereafter, the statute states, each Trustee shall be elected for terms of different duration, and thereafter such Trustees shall be elected at each subsequent general election to each serve a term of four years. Said Section 205.170, defining the grounds of eligibility of citizens of the county for appointment, and election to office, as members of the Board of Trustees for such hospital, and providing for their election and the respective tenures of office of such Trustees, and barring the Trustees from having any interest, directly or indirectly, in the purchase of supplies for such hospital, unless purchased by competitive bidding, reads as follows:

"1. The county court shall appoint five trustees chosen from the citizens at large with reference to their fitness for such office, all residents of the county, not more than three of said trustees to be residents of the city, town or village in which said hospital is to be located, who shall constitute a board of trustees for said public hospital.

"2. The said trustees shall hold their offices until the next following general election, when five hospital trustees shall be elected and hold their offices, three for two years and two for four years, and who shall by lot determine their respective terms.

"3. At each subsequent general election the offices of the trustees whose terms of office are about to expire shall be filled by the election of hospital trustees who shall each serve for a term of four years.

"4. Any vacancy in the board of trustees occasioned by removal, resignation or otherwise shall be reported to the county court

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and be filled in like manner as original appointments, the appointee to hold office until the next following general election, when such vacancy shall be filled by election of a trustee to serve during the remainder of the term of his predecessor.

"5. No trustee shall have a personal pecuniary interest, either directly or indirectly, in the purchase of any supplies for said hospital, unless the same are purchased by competitive bidding."

The period of time for which an officer may hold an office to which he has been elected or appointed, has been the subject of consideration by the provisions of our Constitution, the textwriters, the Legislature of Missouri and the Appellate Courts of this State. 46 C.J. 963, 964, defines "term of office" as follows:

"The phrase 'term of office' is one generally used to mean the fixed period of time for which the office may be held, although it is also used to designate the period for which the office is actually held."

The term of occupancy by officers of all public offices is prescribed by the present Constitution of this State. Section 12 of Article VII of the 1945 Constitution of Missouri, on the point, reads as follows:

"Tenure of Office.--Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

Section 105.010, RSMo 1949, prescribing the terms of office of officers in this State reads as follows:

"All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

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Both the constitutional and statutory provisions specifying the period of tenure of office of officers in this State, here quoted, have been construed by our Supreme Court to authorize an officer to hold over until his successor is elected or appointed and qualifies. In the case of Langston vs. Howell County, 79 S.W.(2d) 99, the Supreme Court, on this question, l.c. 102, said:

"Our Constitution (section 5, art. 14) provides that: 'In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified,' and section 11196 R.S. 1929 (section 9168, R.S. 1919), Mo. St. Ann. § 11196, p. 6141, reads: 'All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified.' We find no constitutional or statutory provision which either expressly or by implication excludes the county highway engineer, or the office of county highway engineer, from the operation and effect of the foregoing constitutional and statutory rule so that since there is no 'contrary provision' the rule so prescribed must be applied. It is said in 46 C.J. p. 968: 'The general trend of decisions in this country is that, in the absence of an express or implied constitutional or statutory provision to the contrary an officer is entitled to hold his office until his successor is appointed or chosen and has qualified.' Langston's official term was fixed at one year, but upon the expiration thereof, no successor having been appointed, his right to hold such office, and his title thereto, continued until the right of a duly appointed and qualified successor attached. His right to hold over and his continuance in the office was of course contingent and defeasible subject to be terminated at any time by the appointment

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and qualification of his successor. During the time an officer so holds over, under the provisions of the constitutional and statutory provisions, supra, he holds the office as a de jure officer (46 C.J. p. 969) and by the same tenure, after the prescribed term, until the right of his duly chosen and qualified successor attaches. It therefore appears that the trial court was in error as to the applicable rule of law, and in holding that Langston was not entitled to hold over and continue in office after the expiration of the term prescribed by the order of appointment."

We have observed from the terms of Section 205.170, supra, that, after the terms of the first elected Trustees have expired, by the provisions of Subsection 3 of said Section 205.170, supra, at each subsequent general election the offices of the Trustees whose terms are about to expire shall be filled by the election of Hospital Trustees who shall each serve for a term of four years. The effect of these provisions immediately and permanently is to demonstrate that the intention of the Legislature was, as the same is expressed in said Sections 205.170 and 205.180, that there shall exist no vacancy in the offices of Trustees of a county hospital, and that the term of office of each Trustee so elected at each subsequent general election shall be for four years. Section 205.180 provides that each candidate for the office of Hospital Trustee shall file with the County Clerk of the county, at least thirty days before the General Election, an announcement, in writing, of candidacy, but in the event there is not a sufficient number of announcements of Trustees filed, the County Court shall appoint such Trustees as may be necessary to fill all vacancies of the Board which result from the expiration of the term of any Trustee, or Trustees, and any such appointee shall serve until the next general election when a Trustee shall be elected to fill the remainder of the unexpired term. Said Subsection 3 definitely fixes the term and period of time to be served by such Trustee, elected at each subsequent general election, at four years. No theory on construction of said provision may change the effect of that provision.

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It means that the term of office of each Trustee shall expire on the last day of the 4 year period from and after the day when such Trustee was elected at such general election. The intention and purpose of the Legislature in so fixing the definite period of four years that each Trustee should serve from and after the date of his or her election so that newly elected Trustees may take office is further shown by the provisions of Section 205.190, RSMo 1949. Subsection 1 of that section provides that the Trustees shall, within ten days after their appointment or election, qualify by taking the oath of civil officers and organize as a Board of Hospital Trustees by the election of one of their number as chairman, one as secretary and by the election of such other officers as they may deem necessary.

The period of four years as the definite period of the term of office of such Trustees, as such, and as fixed by the statutes, is subject to no qualification whatever. But the actual tenure period such officer may hold the office is subject to the provisions of said Subsection 1 of Section 205.190 by which it is provided that his successor shall qualify within ten days after his election or appointment. This principle of the authority of all public officers to hold offices to which they have been appointed or elected until their successors have been duly elected or appointed and qualified has been discussed and authorities cited hereinabove as the law of this State in support of the principle, is applicable here. Manifestly, the period of time of the tenure of office of each Hospital Trustee is, and of necessity must be, continued after the full four year period has expired until his or her successor has been qualified by taking the oath of office required by the statute.

We believe it is clear from the provisions of the several sections noted, and upon which comment has been made and from which quotes are herein set forth, that each newly elected Trustee of a County Hospital shall qualify for and assume the duties of such Trustee

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immediately, upon his or her election, and as soon thereafter as circumstances will permit, as is provided in Subsection 1 of said Section 205.190, and not on January 1st, following, as a fixed date to take office.

CONCLUSION

It is, therefore, the opinion of this office, considering the premises, that newly elected County Hospital Trustees shall take office immediately following the general election at which they are elected, and as soon thereafter as such Trustees may qualify under the terms of Section 205.190, RSMo 1949. Such Trustees should not delay taking over such offices until January 1st following.

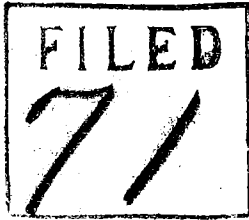
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Very truly yours,

JOHN M. DALTON
Attorney General

GWC:irk

PUBLIC OFFICERS: (1). A public official, otherwise qualified, may be
NOTARIES PUBLIC: appointed and hold a Notary Public commission
and use said commission for purposes outside
the duties of the particular office;
(2). Prosecuting Attorneys in this state, if
Notaries Public, may administer oaths to and
take affidavits of complainants in criminal
cases. However, to avoid complications it
would be best not to do so.



January 22, 1954

Honorable W. H. Pinnell
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Mr. Pinnell:

This office is in receipt of your letter requesting an opinion first, whether it is unlawful for a public official to hold a Notary Public commission and using said commission for purposes outside the duties of the particular office, and, second, whether the Prosecuting Attorney of a county may himself notarize complaints (in criminal cases) instead of having the same signed (and sworn to) before a Magistrate Judge or his Clerk. Your letter requesting an opinion on the two questions reads as follows:

"I would like an opinion from your office on the following:

"Is there anything illegal or unlawful in a public official holding a Notary Public commission and using said commission for purposes outside the duties of the particular office. I would like your further opinion as to whether the Prosecuting Attorney may Notarize Complaints instead of having the same signed before a Magistrate Judge or his Clerk.

"Often times it is extremely difficult to have a Complaint notarized before the Magistrate Judge or his clerk and therefore I would appreciate your opinion on this matter."

Section 486.010, RSMo. 1949, under the title of Notaries Public, providing for the appointment of Notaries Public, does not prescribe

Hon. W. H. Pinnell

any qualifications for the office of a Notary Public except that of residence and age. The section provides that the appointee shall have attained the age of 21 years, and shall be a citizen of the United States and of the State of Missouri. Any person possessing these two qualifications is eligible for an appointment and commission as a Notary Public.

Section 486.020, RSMo 1949, prescribing the powers and duties of Notaries Public in this state reads as follows:

"They may administer oaths and affirmations in all matters incident or belonging to the exercise of their notarial offices. They may receive the proof or acknowledgment of all instruments of writing relating to commerce and navigation, take and certify relinquishments of dower and conveyances of real estate of married women; the proof or acknowledgment of deeds, conveyances, powers of attorney and other instruments of writing, in like cases and in the same manner and with like effect as clerks of courts of record or authorized by law; take and certify depositions and affidavits and administer oaths and affirmations, and take and perpetuate the testimony of witnesses in like cases and in like manner as justices of the peace are authorized by law; make declarations and protests, and certify the truth thereof under their official seal, concerning all matters by them done by virtue of their offices, and shall have all the power and perform all the duties of register of boatmen."

The statute prescribes a definite and fixed term of four years for a Notary Public; he must take and subscribe the oath of office on his commission, give bond, keep records of his acts and provide a seal of office. He is, by these requirements and powers, when fulfilled, made a public officer by the statute.

There is no statute or provision in the Constitution prohibiting any public officer, including Prosecuting Attorneys, from being appointed and commissioned as a Notary Public. The only question

Hon. W. H. Pinnell

that might arise would be whether there might be "incompatibility" between the other public office and the office of Notary Public, in case both offices are held by the same person.

By the terms of Section 12, Article III of the Constitution of 1945 of this state, State Senators and Representatives, who are otherwise expressly prohibited from holding any other offices or employment under the United States, the State or any municipality thereof are made an exception, and may hold, respectively, the office of Notary Public.

Sections 56.060, 56.070, 56.080, 56.090 and 56.100, RSMo. 1949, define and point out the duties of Prosecuting Attorneys. These sections are of ready access for an understanding of such duties and will not be quoted in this opinion. Suffice it to say, however, that none of the duties of a Prosecuting Attorney, as defined in said statutes, partake of or conflict with the duties and privileges of Notaries Public as the same are defined in said Section 486.020, RSMo 1949. Neither do the duties, powers or privileges of a Notary Public partake of or conflict with the duties, powers and privileges of a Prosecuting Attorney. There is no way in which the two offices would conflict with one another. They are compatible and both offices may be held by the same person.

Answering your first question, it is the view of this office that it is not unlawful, but on the contrary, it is lawful, for any public officer, including Prosecuting Attorneys, to hold and use a Notary Public commission for purposes outside of the duties of the particular office. Your second question upon which you request the further opinion of this office is whether the Prosecuting Attorney may notarize complaints instead of having the same signed before a Magistrate Judge or his Clerk.

By this question we understand your letter to mean complaints in criminal cases, and we understand the use of the word "notarize" in your letter to mean administering the oath to a person making an affidavit charging some person, or persons, with a violation of the criminal laws. Your letter states that it is extremely difficult to have a complaint notarized before the Magistrate Judge or his Clerk as the reason for requesting the opinion of this office on this second question.

Your second question would involve, we believe, the use of a notary's commission in taking the preliminary steps necessary for the prosecution of the persons who would be charged with the commission of criminal offenses such as may be set forth in such complaints. If the Prosecuting Attorney should administer the oath to the complainant he would not, as a Notary Public, be

Hon. W. H. Pinnell

entitled to charge or collect a fee therefor, under the terms of Section 56.280 which fixes the salary and compensation of the Prosecuting Attorneys in Class 3 and Class 4 counties. Barry County is one of the Class 3 counties of this state. The Prosecuting Attorney in such a case would not be permitted to collect any fee under the terms of Section 56.340 because such a charge could not be an item to be taxed as costs in any case to be collected and at the end of each month paid to the County Treasurer. For these reasons it plainly appears that the Prosecuting Attorney would not be authorized to charge, collect or retain fees for notarizing complaints made before him as a Notary Public. The vital question here, however, is whether the Prosecuting Attorney may administer the oath necessary in such complaints at the beginning of a criminal case and turn such complaints over to himself as Prosecuting Attorney to be used where he is the prosecutor.

Our statutes do not require an affidavit in a criminal case to be made before any particular officer. Section 545.250, RSMo. 1949, regarding the making of such affidavits reads as follows:

"When any person has knowledge of the commission of a crime, he may make his affidavit before any person authorized to administer oaths, setting forth the offense and the person or persons charged therewith, and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney, or deposit it with the prosecuting attorney, furnishing also the names of the witnesses for the prosecution; and it shall be the duty of the prosecuting attorney to file an information, as soon as practicable, upon said affidavit, as directed in section 545.240."

If the making of an affidavit before the Prosecuting Attorney as a Notary Public should come within the provisions of Section 557.070, RSMo 1949, as a false, or an allegedly false, affidavit, the prosecution of such person would devolve upon the Prosecuting Attorney. Such a situation might become a matter of personal interest involving the prosecuting attorney as a witness and would preclude him from prosecuting the case, if he were still Prosecuting Attorney. This condition, if such existed, would demand that the Court before which the case would be pending should appoint, under the terms of Section 56.110, RSMo 1949, a substitute in his place to prosecute the case.

There is no constitutional or statutory provision prohibiting

Hon. W. H. Pinnell

the prosecuting attorney, if he were a Notary Public, from administering the oath to and taking the affidavit of a complainant in a criminal case. Should he follow that course of proceedings it might, as suggested in the supposed incident noted, or, perhaps under other conditions, become embarrassing to the prosecuting attorney and would be the means, by his own act of preventing the performance by him of his duties as prosecuting attorney defined by the statute of this state. Of course, under such conditions and circumstances a prosecuting attorney would not be violating any statute by remaining in the case, although he might be a witness, but out of an exact sense of the uninfluenced administration of justice the court may, in its discretion, and no doubt would, appoint another to act in his stead. This has been done in this state on occasion, and the appellate courts have sustained the trial court in so doing, or, if such substitute was not appointed by the trial court the appellate courts have reversed cases in order that a disinterested prosecutor be appointed when the regular prosecuting attorney may be interested. A case involving these principles was considered by our Springfield Court of Appeals in State v. Nicholson, 7 S.W.(2d) 375. That was a case however which did not arise from a mere inadvertance or unintentional act of the prosecuting attorney. The case recites that the prosecuting attorney in the case was not only a witness, having made the affidavit to a search warrant to search the premises of the defendant, but he did many other things, as recited in the decision, of an improper and prejudicial character. There would be nothing in the instant case growing solely out of the prosecuting attorney, if a Notary Public, administering an oath and taking an affidavit of a complainant that would be wrongful or unlawful, in and of itself, except to become an impediment to the prosecuting attorney continuing in such case as prosecutor. Of course, such a theoretical case might never arise, but if it, as is always a possibility, should arise from acts performed with the best of intentions, it would disqualify the prosecuting attorney from further acting in the case.

The Springfield Court of Appeals in the Nicholson case, respecting the interest of the prosecuting attorney disqualifying him to act in the case, l.c. 378, said:

"Whenever it appears to the trial court that the personal interest of the prosecuting attorney in any particular case, no matter how that interest may arise, is such as to indicate that he might be influenced thereby and might not be altogether fair to the defendant in the trial of the case, he should be held disqualified and a special prosecutor appointed for that case. In this statement of the law we are upheld by the Supreme Court of this State. State v.

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Jones, 306 Mo. 437, 268 S.W. 83."

The case of State v. Jones, 306 Mo. 437, cited in the Nicholson case, 1.c. 446, on the question of the necessity of the prosecuting attorney being disinterested in a criminal case he prosecutes, said:

"* * *It was never contemplated that he should be empowered to set in motion criminal proceedings against a citizen in a case in which he is interested.
* * *"

It would appear proper for the prosecuting attorney, if he desires to avoid such complications, if he is a Notary Public, to decline to take affidavits to complaints in criminal cases.

A public official may be appointed and hold a Notary Public commission, including prosecuting attorneys, in this state.

It is lawful for a prosecuting attorney in this state, if he holds a Notary Public commission, to administer oaths to complainants who make affidavits to complaints in criminal cases. However, in order to avoid embarrassment and complications by becoming in anywise interested in such a case, it would be best for him not to do so.

CONCLUSION

Considering the premises, it is, therefore, the opinion of this office that:

- 1) It is lawful for a public official, including a prosecuting attorney, to hold a Notary Public commission and use said commission for purposes outside the duties of the particular office;
- 2) There is no constitutional or statutory provision prohibiting a prosecuting attorney, if he holds a Notary Public commission, from administering oaths to persons making affidavits as complainants in criminal cases. However, to avoid complications, and to avoid creating a condition which might cause him to be

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interested and cause a substitute to be appointed in his stead for the prosecution of the case, he should decline to do so.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. George W. Crowley.

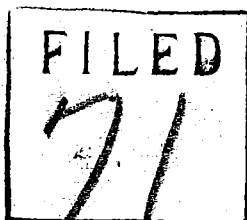
Yours very truly,

JOHN M. DALTON
Attorney General

GWC:mw:ir

SPECIAL ROAD DISTRICTS:
DISSOLUTION:
ORGANIZATION:

In order to form two special road districts out of one existing special road district, the existing district must be dissolved according to applicable law, and the two new districts organized out of the territory formerly comprised in the dissolved district.



February 18, 1954

Honorable W. H. Pinnell
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"In this county there is a large Special Road District in which some of the members at one end of the District wish to form another separate and Special Road District. In other words the District is situated so geographically that it could be formed into a north and south Road District.

"Will you please give me an opinion from your office first if this can be done and second if it can be done the exact procedure for creation of the Special Road District."

From your letter we deduce that you wish to know how two special road districts can be created out of one existing special road district. We first note that Barry is not a Township organization county.

A careful search of the Missouri law applicable to special road districts fails to disclose any method or provision whereby one special road district may be divided into two separate special road districts. We find nothing in the law which indicates that our lawmakers contemplated any such action. In lieu of such method or provision it is our opinion that in order to divide your special road district and out of it form two districts, you would have to dissolve the present district and organize the territory which it now comprises into two new districts. If your present special road district is a city or town road district organized under the provisions of Section 233.010 et seq., RSMo. 1949, then its dissolution would be effected according to the provisions of Section 233.160 et seq., RSMo. 1949. If, however, your present special road district is

Honorable W. H. Pinnell

a benefit assessment district organized under Section 233.170 et seq., RSMo. 1949, then its dissolution would be effected under Section 233.295 et seq., RSMo. 1949. Likewise organization of the two new special road districts would be, if one or both are to be city or town special road districts, under Section 233.010 et seq., RSMo. 1949, and, if either or both are to be benefit assessment districts, organization would be under Section 233.170 et seq., RSMo. 1949.

CONCLUSION

It is the opinion of this department that in order to form two special road districts out of one existing special road district that the existing district must be dissolved according to applicable law, and the two new districts organized out of the territory formerly comprised in the dissolved district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

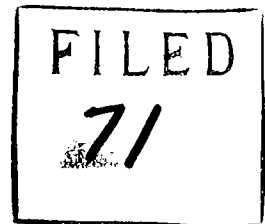
Very truly yours,

John M. Dalton
Attorney General

HPW/vtl

REAL PROPERTY: Tracts of land omitted in previous years from
TAXATION: assessment may be assessed when discovered,
and the assessment of land or lots in numerical
order or by plats in a land list in alphabetical order, shall
be a sufficient assessment. However, no land can be sold for
delinquent taxes under the Jones-Munger procedure for tax sales
unless the notice of sale contains the names of all record owners
or the names of all owners appearing on the land tax book. There-
fore, it appears necessary in the situation presented by this
opinion request that the owner(s) of record of the land in question
must be determined before a sale for delinquent taxes can be had.

March 16, 1954



Honorable Walter W. Pierce
Prosecuting Attorney of Bates County
200 Seelinger Building
Butler, Missouri

Dear Sir:

By your letter of January 20th, 1954, you requested an
official opinion, as follows:

" * * * STATEMENT OF FACTS

"The County Treasurer states that
there are, in this county, a consider-
able number of small tracts of land,
of little market value, the title owners
of which are very difficult to deter-
mine, if indeed any determination could
be made at all.

"QUESTION: The only question arising
is, if these lands were to be assessed
against whom should they be so assessed?
(It is desired to have them assessed and
sold for taxes in order to get them back
on the books as a source of revenue to
the State.)"

We note that Bates County is a county of the third
class with township organization.

In a subsequent letter you stated:

Honorable Walter W. Pierce

" * * * by 'title owners', we refer to the owners appearing on the records of the recorder's office."

Section 137.165, RSMo 1949, provides for assessment of lands omitted in the assessment of previous years, as follows:

"If by any means any tract of land or town lot shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same, when discovered, shall be assessed by the assessor for the time being, and placed upon his book before the same is returned to the court, with all arrearages of tax which ought to have been assessed and paid in former years charged thereon."

Section 137.170, RSMo 1949, provides that each tract of land is charged with its own taxes.

"Each tract of land or lot shall be chargeable with its own taxes, no matter who is the owner, nor in whose name it is or was assessed. The assessment of land or lots in numerical order, or by plats and a land list in alphabetical order, as provided in this chapter, shall be deemed and taken in all courts and places to impart notice whatever they may be, that it is assessed and liable to be sold for taxes, interest and costs chargeable thereon; and no error or omission in regard to the name of any person, with reference to any tract of land or lot, shall in anywise impair the validity of the assessment thereof for taxes."

Sections 137.430 and 137.435, RSMo 1949, make provisions for assessment of lands in township organization counties:

Section 137.430.

"All personal property shall be assessed annually; real property shall be assessed as provided by law."

Honorable Walter W. Pierce

Section 137.435.

"All real property shall be assessed in the township in which the same is situated, with the owner's name thereof, if known; if the owner's name is not known, then it shall be assessed as nonresident."

Thus, it is not necessary, for a valid assessment of land, that the record owner, or other owner be known.

However, land cannot be sold for delinquent taxes by an administrative procedure as provided by the "Jones-Munger Act" unless notice is given as required by Article X, Section 13, Missouri Constitution of 1945:

"No real property shall be sold for state, county or city taxes without judicial proceedings, unless the notice of sale shall contain the names of all record owners thereof, or the names of all owners appearing on the land tax book, and all other information required by law."

Section 140.150, RSMo 1949, makes similar provisions:

"1. All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge that lien for said delinquent and unpaid taxes as provided for in this chapter on the fourth Monday in August of each year.

"2. No real property shall be sold for state, county or city taxes without judicial proceedings, unless the notice of sale shall contain the names of all record owners thereof, or the names of all owners appearing on the land tax book and all other information required by law; provided, however, delinquent taxes, with penalty, interest and costs, may be paid to the county collector at any time before the property is sold therefor.

Honorable Walter W. Pierce

"3. The entry of record by the county collector listing the delinquent lands and lots as provided for in this chapter shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs."

Provision for selling land for delinquent taxes in third class counties (as is Bates County) is made by the "Jones-Munger Act."

The Supreme Court of Missouri declared in *Granger v. Barker*, 236 S.W. (2d) 293, l.c. 295, that such sales were not judicial proceedings:

"The tax sale involved in this case was held under the provisions of the Jones-Munger Law, Sec. 11117ff, R.S. 1939, Mo. R.S.A. Sec. 11117ff. Since the enactment of this law in 1933, sales of land for delinquent taxes have been by administrative rather than by judicial proceedings as was formerly the case. * * *"

Therefore, it must be concluded that land cannot be sold for taxes under the Jones-Munger procedure unless the notice of sale contains the names of all record owners, or the names of all owners appearing on the land tax book.

CONCLUSION

In the premises, it is the opinion of this office that tracts of land omitted in previous years from assessment may be assessed when discovered, and that the assessment of land or lots in numerical order, or by plats in a land list in alphabetical order, shall be a sufficient assessment. However, no land can be sold for delinquent taxes under the Jones-Munger procedure for tax sales unless the notice of sale contains the names of all record owners or the names of all owners appearing on the land tax book. Therefore, it appears necessary in the situation presented by this opinion request that the owner or owners of record of the land in question be determined before a sale for delinquent taxes can be had.

Honorable Walter W. Pierce

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

OFFICERS:
ARE CIVILLY LIABLE FOR DAMAGES
WHEN SIGNING COMPLAINTS FOR
ISSUANCE OF CRIMINAL WARRANTS;
WHEN:

A sheriff, or member of State Highway Patrol signing complaint for criminal warrant does so in individual and not in official capacity. If prosecution based on complaint terminates favorably to accused, who

sues complainant in civil action for damages, latter has same legal rights in defending as any other citizen under same conditions. If he successfully alleges and proves that at the time complaint was signed he had probable cause to believe, and did believe, that the crime alleged was committed, and was committed by accused, this is a valid and complete defense and will render him immune from civil liability for damages in such action.

FILED

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May 5, 1954

Hon. W. H. Pinnell
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

This department is in receipt of your recent request for a legal opinion, which reads in part as follows:

"The problem often arises as to the civil liability of a Law Enforcement Officer in signing complaints as such Law Enforcement Officer, either in misdemeanor or felony cases. In particular, does the Sheriff or a member of the Highway Patrol have any immunity when they sign a complaint, in either felonies or misdemeanors, that a crime has been committed. This question is based on the premise that they have reasonable grounds to believe that a crime has been committed. * * * * *

The request is not clear to us and we are not sure as to the exact inquiry intended to be presented, but assume that your question is whether or not a sheriff or a member of the State Highway Patrol who signs a complaint accusing a person of a criminal offense, and when a criminal prosecution based on said complaint is instituted, terminates favorably to the accused, if such officer has any immunity in a civil action for damages brought against him by the accused. The inquiry appears to infer that the complainant in such instances is at the time acting as a law enforcement officer. It is also stated that the request is based on the premise (apparently that at the time of the signing of the complaint) the officer would have "reasonable grounds to believe that a crime has been committed."

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Chapter 57 RSMo 1949 contains all the statutory provisions regarding the office of sheriff, and Sections 57.100 and 57.110 of said chapter give the general duties required of him, and the later section states that he is a conservator of the peace. Section 57.100 reads as follows:

"Every sheriff shall quell and suppress assaults and batteries, riots, routs, affrays and insurrections; shall apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by magistrates."

Section 57.110 reads as follows:

"Every sheriff shall be a conservator of the peace within his county, and shall cause all offenders against law, in his view, to enter into recognizance, with security, to keep the peace and to appear at the next term of the circuit court of the county, and to commit to jail in case of failure to give such recognizance. In any emergency the sheriff shall appoint sworn deputies, who shall be residents of the county, possessing all the qualifications of sheriff. Such deputies shall serve not exceeding thirty days, and shall possess all the powers and perform all the duties of deputy sheriffs, with like responsibilities, and for their services shall receive two dollars per day, to be paid out of the county treasury."

Neither of these sections provide that one of the official duties of the sheriff shall be the signing of complaints accusing persons of criminal offenses, which complaints are used as a basis for the institution of criminal prosecutions. It further appears that no other section or sections of the statutes of Missouri impose the duty of signing such complaints upon the sheriff; consequently, the signing of them is no part of the official duties of the sheriff. In doing so, the sheriff acts, not in his official capacity, but in his individual capacity, and as a private citizen. Even though he should attempt to sign an affidavit for a state warrant as a law enforcement officer, for example, by adding the words

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"Sheriff of _____ County, Missouri," after his signature, such words would not change the character of this signature in any manner, but would only be descriptive of the person who signed the complaint, and the affixing of the signature would only be an act of a private citizen.

Chapter 43 RSMo 1949 and Sections 43.050 and 43.070, later added to the chapter as shown by the Revised Statutes of Missouri 1953, Cum. Supp., contains all the statutory provisions in regard to the Highway Patrol of Missouri. Sections 43.160, 43.180, 43.190, 43.200, and 43.210 RSMo 1949, give the general duties of the members of the Highway Patrol.

Section 43.160 reads as follows:

"It shall be the duty of the patrol to police the highways constructed and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws of this state relating to the operation and use of vehicles on the highways; to enforce and prevent thereon the violation of the laws relating to the size, weight and speed of commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the commission. It shall be the duty of the patrol whenever possible to determine persons causing or responsible for the breaking, damaging or destruction of any improved hard surfaced roadway, structure, sign markers, guard rail, or any other appurtenance constructed or maintained by the commission and to arrest persons criminally responsible therefor and to bring them before the proper officials for prosecution. It shall be the duty of the patrol to cooperate with such state official as may be designated by law in the collection of all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all license fees and taxes upon motor vehicles, trailers, and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt,

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storage, distribution, sale or use thereof (except the sales tax on motor vehicles and trailers, and all property taxes)."

Section 43.180 reads as follows:

"The members of the state highway patrol, with the exception of the director of radio and radio personnel, shall have full power and authority as now or hereafter vested by law in peace officers when working with and at the special request of the sheriff of any county, or the chief of police of any city, or under the direction of the superintendent of the state highway patrol, or in the arrest of anyone violating any law in their presence or in the apprehension and arrest of any fugitive from justice on any felony violation. The members of the state highway patrol shall have full power and authority to make investigations connected with any crime of any nature. The expense for the patrol's operation under this section shall be paid monthly by the state treasurer chargeable to the general revenue fund, provided, however, the amount appropriated from the general revenue fund shall not exceed ten per cent of the total amount appropriated for the Missouri state highway patrol."

Section 43.190 reads as follows:

"The members of the patrol, with the exception of the director of radio and radio personnel, are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of

Hon. W. H. Pinnell

this state. When a member of the patrol is in pursuit of a violator or suspected violator and is unable to arrest such violator or suspected violator within the limits of the district or territory over which the jurisdiction of such member of the patrol extends, he shall be and is hereby authorized to continue in pursuit of such violator or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such violator or suspected violator wherever he may be overtaken."

Section 43.200 reads as follows:

"The members of the patrol shall not have the right or power of search nor shall they have the right or power of seizure except to take from any person under arrest or about to be arrested deadly or dangerous weapons in the possession of such person."

Section 43.210 reads as follows:

"Any person arrested by a member of the patrol shall forthwith be taken by such member before the court or magistrate having jurisdiction of the crime whereof such person so arrested is charged there to be dealt with according to law."

None of the above quoted sections of the Missouri statutes nor any others impose the duty of signing complaints accusing persons of criminal offenses upon members of the State Highway Patrol. A member of the patrol may, within his discretion, legally sign such complaints under the same circumstances and to the same extent as any other citizen, and the signing of affidavits for the issuing of state warrants is no part of the official duties of a member of the patrol. If a patrolman were to attempt to sign a complaint in the capacity of a law enforcement officer, for example, by adding the words or title, "Captain, Missouri State Highway Patrol," after his signature, these words would not make the affixing of the signature an official act, but would, as in the instance of the sheriff

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mentioned above, be merely descriptive of the person who signed the complaint and of course that person would be a private citizen insofar as the law is concerned.

Section 543.050 RSMo 1949 provides when a magistrate shall issue a warrant for the arrest of a person accused of a misdemeanor and reads as follows:

"Upon the filing of a complaint in a magistrate court, verified by the oath or affirmation of a person competent to testify against the accused, if the magistrate be satisfied that the accused is not likely to try to escape or evade prosecution for the offense alleged, it shall be his duty to forthwith forward such complaint to the prosecuting attorney, and it shall be the duty of the complainant to forthwith inform the prosecuting attorney what facts can be proved against the accused, and by what witnesses, and the residence of such witnesses; and if, after investigation of such facts, the prosecuting attorney be satisfied that an offense has been committed, and that a case against the accused can be made, it shall be his duty to immediately file his information before the magistrate taking the complaint, and give to said magistrate a list of the witnesses to be subpoenaed on the part of the state; and upon the filing of the information by the prosecuting attorney, as herein provided, with the magistrate, or upon the filing of an information by the prosecuting attorney upon his own information and belief, without complaint of a private individual having previously been filed, it shall be the duty of the magistrate to forthwith issue a warrant for the arrest of the defendant, directed to the sheriff, or, if no such officer is at hand, then to some competent person who shall be specially deputed by the magistrate to execute the same, by written endorsement to that effect on such warrant."

Section 544.020 RSMo 1949 provides when a magistrate shall issue a warrant for the arrest of a person accused of a felony and reads as follows:

Hon. W. H. Pinnell

"Whenever complaint shall be made, in writing and upon oath, to any magistrate setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

From the foregoing, it is our thought that neither a sheriff nor a member of the State Highway Patrol can, under the present law, sign an affidavit for a state warrant in his official capacity, but may sign same only in his individual capacity. It therefore follows, in such instances, that the complainant has the same rights, duties and liabilities as any other citizen would have under the same or similar circumstances.

In the event the accused person is prosecuted for the criminal offense alleged against him in the complaint, and the prosecution terminates favorably to him; the accused thereafter brings a civil suit for damages against the complainant; the mere fact that defendant was a sheriff or a member of the State Highway Patrol will not afford the defendant any immunity from civil liability in such suit, nor will it afford him any special privileges in making his defense.

By the word "immunity," as used in the opinion request, we assume that the writer intended to use such term in the sense as to whether or not the plaintiff in a civil action for damages could legally recover a judgment against the defendant.

It is also noted that the request assumes that the sheriff had "probable grounds" for believing that a crime had been committed, apparently, when he signed the complaint. It appears to us that the terms "probable cause" would more correctly convey the meaning which the writer must have intended. Therefore, we shall use the terms "probable cause" rather than "probable grounds" in the course of this discussion. In this connection, we call attention to the case of *Foster vs. Railroad Company*, reported in Volume 321, No. 1202, in which a definition of "probable cause" was given. At l.c. 1221, the court said:

"Probable cause for criminal prosecution has been defined as 'a reasonable ground for suspicion, supported by circumstances sufficiently strong in

Hon. W. H. Pinnell

themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.' (18 R.C.L. 35, citing Stacey v. Emery, 97 U.S. 642. See also Stubbs v. Mulholland, supra, p 74; Irons v. Express Co. (Mo.), 300 S.W. 283; Carp v. Ins. Co., 203 Mo. 295, 101 S.W. 78; Hanser v. Bieber, 271 Mo. 326, 197 S.W. 68.)"

Also, the court said in the case of Coleman v. Ziegler, 226 SW2d, 388, at l.c. 391, as follows:

"* * * Our courts have uniformly held that probable cause which will relieve a prosecutor from liability 'is a belief by him of the guilt of the accused, based on circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man.' Butcher v. Hoffman, 99 Mo.App. 239, 250, 73 S.W. 266, 269. See also Vansickle v. Brown, 68 Mo. 627; Stubbs v. Mulholland, 168 Mo. 47, 67 S.W. 650; Christian v. Hanna, 58 Mo. App. 37."

As to whether or not a complainant has probable cause at the time of signing a complaint accusing one of a criminal offense is always a question of fact to be determined from each individual case, but in the event the complainant is subsequently sued for damages in a civil suit, for damages, if the defense of probable cause is properly pleaded, and proven to the satisfaction of the court or jury, it will be a valid and complete defense to such action, thereby preventing the recovery of a judgment by the plaintiff, and will render the defendant immune from all civil liability for damages in connection with such suit. We believe that our contention as stated, is fully sustained by the holding in the case of Kvasnicka v. Montgomery Ward, 350 Mo. 360, in which the court said at l.c. 372:

"At the request of plaintiff the court told the jury that 'by "probable cause" is meant reasonable grounds for belief supported by circumstances sufficiently strong to warrant a reasonably prudent man, in good faith, to believe that the accused was guilty of the offense charged.'

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See, Foster v. Chicago, B. & Q. R. Co., 321 Mo. 1202, 14 S.W. (2d) 561, 570. Of course, if it appears that there was probable cause for the arrest, indictment and prosecution of plaintiff such fact constitutes a complete defense to this action for malicious prosecution. The burden of proof to show want of probable cause was upon the plaintiff."

CONCLUSION

It is therefore, the opinion of this department that when a sheriff or a member of the State Highway Patrol signs a complaint accusing a person of a criminal offense, such act is in his individual, and not in his official capacity. That in the event a criminal prosecution based on said complaint terminates favorably to the accused person, who later brings a civil action for damages against the complainant, said complainant, in making his defense, has the same legal rights and privileges that any other private citizen would have under the same or similar circumstances. However, if the complainant pleads and proves as his defense that at the time he signed the complaint, he had probable cause to believe, and did believe, that the criminal offense alleged had been committed and that the person accused committed said offense, that such is a valid and complete defense and will render him immune from any civil liability in said action.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

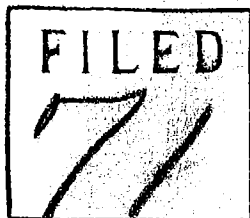
Very truly yours,

JOHN M. DALTON
Attorney General

PNC:am

FOOD AND DRUGS: MEAT:
WHEN OWNER MAY LEGALLY SELL
MEAT FROM HOME BUTCHERED
LIVESTOCK:

One who butchers and sells meat from own livestock in grocery store in incorporated city may legally do so; a farmer may legally sell meat from his livestock directly to a grocery store or meat market.



September 8, 1954

Honorable W. H. Pinnell
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion which reads as follows:

"I would like an opinion from your office as to whether a man who owns a Grocery Store may butcher his own livestock and sell the meat therefrom at his place of business without violating any State law. Further, may a farmer sell meat from livestock which he has butchered directly to a Grocery Store or meat market without violating any State law.

"Thanking you, I am, * * *."

The statement of facts is very general in nature and at our request a clarification of same has been given. We now understand the facts regarding the first inquiry to be substantially as follows:

An individual owns and operates a grocery store in an incorporated city and is also engaged in the operation of a farm in the same county. Livestock is kept on the farm, which livestock is butchered and the meat sold at the store of the owner in the city.

The first inquiry is whether or not the merchant-farmer can, under these facts sell the meat from the livestock kept on his

Honorable W. H. Pinnell

farm at his store without violating any state law.

Chapter 196, RSMo 1949, consisting of Sections 196.010 to 196.890, inclusive, has been called the "Missouri Food and Drug Act," and provides for the regulation, inspection, manufacture, and sale of all foods, drugs and cosmetics within the state as well as providing for the manufacture, processing and sale of human food under strictly sanitary conditions provided in said chapter.

Paragraph 7, Section 196.010, RSMo 1949, defines the term food as follows:

"(7) The term 'food' means articles used for food or drink for man or other animals, chewing gum, and articles used for components of any such article;"

From this definition it is readily seen that meat is a food and as such its processing or sale is subject to the applicable sections of said Chapter 196.

The violation of different sections of Chapter 196, particularly, those providing for sanitary requirements in the production and sale of foods are declared to be criminal offenses and punishable as such. For example, we call attention to Sections 196.015, 196.020, and 196.025, RSMo 1949.

In the instant case, assuming that the merchant who butchers livestock on his farm and then sells the meat at his store has complied with every applicable provision of Chapter 196, RSMo 1949, relating to the manufacture, production, inspection and sale of such meats as to the sanitation of the meat itself, and the place where it is butchered, and is sold, or offered for sale to the public, such merchant may sell meat thus produced on his farm since no Missouri statute prohibits him from so doing.

Assuming that the farmer referred to in the second inquiry has complied with the applicable provisions of Chapter 196, RSMo 1949, he may sell meat butchered from his livestock directly to a grocery store or meat market, since no Missouri statute prohibits him from so doing.

Honorable W. H. Pinnell

CONCLUSION

It is the opinion of this department that no Missouri statutes prohibit:

(1) A grocery store owner from butchering his livestock and selling the meat therefrom in such grocery store.

(2) A farmer from butchering his livestock and selling the meat therefrom directly to a grocery store or meat market.

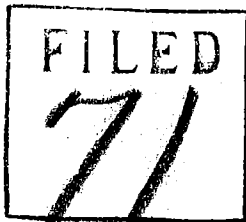
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General

PNC:vlw;sm

AGRICULTURE: The Commissioner of Agriculture, his agents or licensed A and C graders do not have the authority to destroy, by dumping, illegal cream.



November 15, 1954

Mr. Paul L. Porter
Director, Dairy Division
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads in part as follows:

"The problem in question: 'Can condemned cream be legally disposed of by pouring down the drain, rather than being returned to the producer?'

* * * * *

"I am respectfully submitting this problem to you for your opinion as to whether creameries, upon condemning cream, may legally dispose of same by dumping."

Section 196.550, RSMo 1949, provides as follows:

"The commissioner or his agents, or any licensed A or C grader, are hereby given authority to condemn any illegal dairy product which is delivered, sold, accepted, purchased, or held in possession for human food purposes, and shall tag the same as an unlawful product, and it shall be unlawful to remove or deface any such tags so long as the container to which it is attached contains the product identified by the tag. The commissioner, or his agent, or any licensed A or C grader, shall also color such illegal dairy product with a permanent and harmless coloring matter sufficient to show unmistakably that such product is illegal. It shall be unlawful to sell or offer for sale or to buy for use as human food or for the manufacture of human food any illegal dairy product."

Mr. Paul L. Porter

Section 196.520 (65) defines the term "Unlawful cream" as follows:

"'Unlawful cream' is cream which contains or has contained dirt, oil, or other foreign or extraneous matter that renders it unfit for human consumption, or that is stale, cheesy, rancid, putrid, or is decomposed. Unlawful cream is hereby declared to be injurious to the public health, and immediately upon its examination and discovery by any licensee hereunder, the title thereto shall immediately vest in the commissioner for the purpose of effectively removing it from the possible use in human food. Such unlawful cream is hereby declared to be contraband, and may be seized by an agent of the commissioner, or any A or C licensee hereunder;"

It is, of course, fundamental that the primary rule of statutory construction is to ascertain and give effect to the intention of the legislature, taking into consideration the purpose sought to be accomplished by the legislation. *Roberts v. City of St. Louis*, 242 S.W. 2d 293. We believe that it is evident from a reading of the above two noted provisions that it was the purpose of the legislation to provide a means of removing adulterated cream from the channels of human consumption and to provide a method to effectuate such removal. Section 196.550, supra, provides that the Commissioner of Agriculture or his agents, or any licensed A or C grader, shall color such illegal dairy product with a permanent and harmless coloring matter. This procedure, we believe, sufficiently removes the product from the channels of human consumption, as contemplated by the purpose of the act and by providing such method, rather than absolute destruction, and indicating that the coloring matter shall be harmless is sufficient indication that the legislature did not intend to render the product valueless for all purposes. Likewise, while Section 196.520 (65) provides that unlawful cream shall be deemed contraband and that title thereto shall vest in the Commissioner of Agriculture, such title only vests "for the purpose of effectively removing it from the possible use in human food," again indicating that the intention was not to deprive the owner of the use of such cream for purposes other than human consumption.

Mr. Paul L. Porter

CONCLUSION

Therefore, it is the opinion of this office that the Commissioner of Agriculture, his agents or licensed A or C graders do not have the authority to dump or otherwise destroy illegal cream, but are relegated to their statutory duty of coloring such cream to prevent its possible use in human feed.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

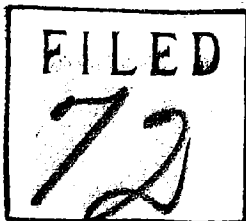
Yours very truly,

John M. Dalton
Attorney General

DDG/vtl

MOTOR VEHICLES:

POLICE DEPARTMENTS:



- 1) Members of Police Departments of this State must produce satisfactory evidence of financial responsibility under the new Motor Vehicle Safety Responsibility Law of this State when involved in an accident.
- 2) Individual members of the Police Department of cities in this State while driving department automobiles are personally, legally liable for negligence involving other persons and property

January 11, 1954

Board of Police Commissioners
Kansas City, Missouri

Attention: Honorable Harry F. Murphy,
Secretary.

Gentlemen:

This is the opinion you have requested of this office upon the questions, first, whether, under the new "Motor Vehicle Safety Responsibility Law", a member of the Police Department of Kansas City, Missouri, will be required to produce satisfactory evidence of financial responsibility when he is involved in an accident while driving an automobile belonging to the department at the time he is performing official duties, and,

Second, whether a member of the Police Department of Kansas City, Missouri, is legally personally liable when he is involved in an accident while driving an automobile belonging to the department at a time when he is performing official duties.

Your letter submitting these questions for our opinion reads as follows:

"Under the New Motor Vehicle Responsibility Law we have been requested by a number of the members of the Police Department to explain to them their own personal liability and their responsibility for any accidents in which they might become involved while on official duties in the operation of motor vehicles owned by the Police Department.

"We had in mind that we might be able to provide liability insurance to the men as individuals but we have been unable

Board of Police Commissioners:

to find any company in the United States that writes such type of insurance. It occurred to us that we might qualify as a self-insurer. The Department of Revenue, however, has written us that we are exempt under Section 303.050.

"We have instructed all personnel to report any accident in which a department motor vehicle might be involved under Section 303.040. Over a period of years we have had very few suits filed against the individual operator charging him with negligence and I know of no case in which a judgment was entered against an officer while he was acting in the performance of his official duties.

"We should like to have an opinion from your office. Under the Act will a member of the Police Department be required to produce satisfactory evidence of financial responsibility when he is involved in an accident while driving an automobile belonging to the department at a time he is performing official duties?

"We should also like to have an opinion as to the legal liability of an officer personally under the same circumstances as stated above."

The new Motor Vehicle Safety Responsibility Law was passed as House Bill No. 19 by the 67th General Assembly of this State.

Your letter states that your Commission is advised by the Department of Revenue that your department is exempt under Section 303.050. By that statement we understand that the Department of Revenue was advising that your department is exempted from the terms of the Act. The specific section of the Act on the subject of exemptions, as we read House Bill No. 19, is Section 303.330, pages 24, 25. That section reads as follows:

"303.330. Notwithstanding else herein contained, this chapter shall not apply with respect to any motor vehicle owned

Board of Police Commissioners:

by the United States, the state of Missouri, or any political subdivision of this state, or any municipality therein, nor shall this chapter apply to any common carrier or contract carrier whose operations are subject to the jurisdiction of and are regulated by the interstate commerce commission or the public service commission of Missouri, or by regulatory ordinances of the municipalities served by such common or contract carrier, and which shall have satisfied any applicable requirements concerning bond, insurance or proof of financial responsibility imposed by the regulatory authority having jurisdiction over the carrier's operations."

The section numbers contained in said House Bill No. 19, as passed by the 67th General Assembly, have been officially allocated and classified by the Legislative Research Committee by numbers as such sections will permanently appear in V.A.M.S., 1949, when completed, to include this Act. This allocation now appears in pamphlet form, Vernon's June, 1953, Annotation of the laws passed by the last Legislature, page 58.

The Department of Revenue has also issued a compilation in booklet form of the sections of the Act numbered as they appear in said Vernon's June, 1953, Annotation. We shall refer to Vernon's June, 1953, Annotation herein for identification of the numbers of the sections of the Act. In answering your first question we will give consideration first to Section 303.350, Vernon's June, 1953, Annotated Missouri Statutes, page 71, otherwise Section 303.330, House Bill No. 19. This section was first enacted as Subparagraph (b) of Section 4 of C.S. for H.B. No. 317, Laws of Missouri, 1945, page 1207, l.c. 1210. That subsection is identical in wording with said Section 303.350, Vernon's said June, 1953, Annotation, page 71, except that the word "chapter" is twice substituted in said Section 303.350 for the word "act" as used in said Subsection (b) of Section 4 of said C.S. for House Bill No. 317.

This office rendered an opinion dated September 26, 1946, to Colonel Hugh H. Waggoner, Superintendent, Missouri State Highway Patrol, Jefferson City, Missouri, relating to the same subject and question submitted here in your question number 1 asking for the opinion of this office. We believe said opinion of said last named day and date fully answers your first question to the effect that members of the Police

Board of Police Commissioners:

Department of Kansas City, Missouri, as officers of a municipal corporation are not exempted from the terms of Section 303.350, Vernon's June, 1953, Annotation of the laws passed by the 67th General Assembly of this State, and that under said Act a member of the Police Department of a municipal corporation, including the City of Kansas City, Jackson County, Missouri, will be required to produce satisfactory evidence of financial responsibility when he is involved in an accident while driving an automobile belonging to the department at a time he is performing official duties. We are herewith transmitting to you a copy of that opinion.

Your first question having been answered by the opinion dated September 26, 1946, we will now consider your second question as to the personal legal liability of a member of your Police Department when he is involved in an accident while driving an automobile belonging to your department at a time he is performing official duties.

The members of a Police Department are held to the same degree of care in the performance of their official duties and are held to the same degree of liability for negligence in the performance of such duties as are required of private individuals. 43 C.J. so states in the text of that work, at page 771, as follows:

"Since policemen must exercise their authority in a lawful manner, they may be required to answer for damages for abuse of authority, or for injuries resulting from their negligence while in the performance of their duties, * * *."

We do not find a Missouri case deciding this particular principle of law. This appears to be the rule announced by the Appellate Courts of other States where the question has been considered and decided. The Court of Appeals of Kentucky decided this precise question in *Manwaring vs. Geisler*, 230 S.W. (2d) 918, holding that a police officer is liable for injuries to another while in discharge of his official duties for negligence resulting in such injuries. That Court, l.c. 919, 920, on the question said:

"Appellant Manwaring was acting both as a police officer and fireman at the time

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of the accident to appellee, Geisler, and it is impossible to separate his duties one from the other. In such case the surety may be held liable. The injured party will not be required to draw fine distinctions and determine whether the officer was doing more duty as a policeman than as a fireman, or vice versa, if he was performing any duty as a police officer. Nor is a peace officer exonerated from liability for an injury inflicted on another while in the discharge of official duties on the ground of public necessity if the officer failed to exercise reasonable care for the protection of those whom he knew, or by the exercise of reasonable judgment should have expected, to be at the place of the injury, although he may not be criminally liable. * * *."

We have observed by the provisions of said Section 303.350, Vernon's June Annotation, aforesaid, that, while motor vehicles owned by the State of Missouri or any political subdivision of this State or by any municipality therein are exempt from the terms of the chapter, the drivers thereof are not exempted from any of the terms of the new "Motor Vehicle Safety Responsibility Law" of this State. The text authorities and the Courts, when the Courts have spoken on the question, hold that the driver of a motor vehicle is liable for his negligence even though the municipality is exempt therefrom. 62 C.J.S., page 1110, states this text:

"* * * The fact that a municipality is not liable for the unlawful or negligent act of police officers in discharge of their public duties does not exempt the officers from liability therefor. * * *."

This question was considered and decided by the Appellate Court of Illinois in La Cerra vs. Woodrich, reported 52 N.E. (2d) 461. That Court upheld this rule where the Court, 1.c. 465, citing an earlier Illinois case, said:

"* * * City of Chicago v. Williams, 182 Ill. 135, 137, 55 N.E. 123, holds adversely to defendant's contention and

Board of Police Commissioners:

the opinion cites several cases that hold that the municipality is not liable for illegal acts committed by police officers in the performance of their duties, but that the police officers are liable as individuals for the commission of such acts."

It will be observed from the terms of said Section 303.350, Vernon's June Annotation, and from the opinion of this office dated September 26, 1946, that, although a State or municipally owned motor vehicle itself is exempted from the terms of the Motor Vehicle Safety Responsibility Act in force at that time, the driver of the vehicle was not exempted. That opinion cites and quotes from the Wymore case so holding, 165 S.W. (2d) 618, l.c. 620. Our answer to your second question is that a member of the Police Department of a municipal corporation, including the City of Kansas City, Missouri, is personally, legally liable for negligence resulting in injury or death to another or injury to property if he is involved in an accident while driving an automobile belonging to the department at a time he is performing official duties.

CONCLUSION

It is, therefore, considering the premises, the opinion of this office that:

1) A member of any Police Department of any city in Missouri is required under the new Motor Vehicle Safety Responsibility Law of this State to produce satisfactory evidence of financial responsibility when such officer is involved in an accident while driving an automobile belonging to the department at a time he is performing official duties.

2) A member of any Police Department of a municipal corporation, including the City of Kansas City, Missouri, is personally, legally liable for negligence resulting in injury or death to another, or injury to property, if he is involved in an accident while driving an automobile belonging to the department at a time he is performing official duties.

Board of Police Commissioners:

The foregoing opinion, which I hereby approve,
was prepared by my Assistant, Mr. George W. Crowley.

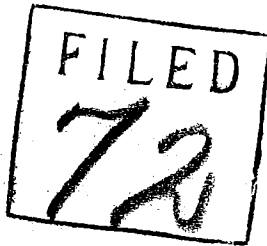
Yours very truly,

JOHN M. DALTON
Attorney General

GWC:irk

ELECTION COMMISSIONERS:
OFFICERS:

A president or vice-president of the Missouri Federation, Women's Democratic Club is not disqualified from holding the post of election commissioner of Clay County, Missouri by reason of holding such office in said club.



January 22, 1954

Honorable Stephen R. Pratt
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

By your letter of January 12, 1954, you requested an official opinion, in part, as follows:

" * * * an opinion on whether or not a woman holding an office of president or vice-president of the Missouri Federation, Women's Democratic Club, can also be appointed to a County Election Board, and still retain her position as an officer in the Missouri Federation, Women's Democratic Club. * * *"

We presume that the county in which you are interested is Clay County, and, therefore, this opinion is restricted to Clay County. We further presume that the "County Election Board" to which you refer is the Board of Election Commissioners created by Section 119.070, Senate Bill No. 5, 67th General Assembly, appearing in V.A.M.S., Cumulative Annual Pocket Part, which provides as follows:

"1. There is hereby created a board of election commissioners for each county governed by the provisions of this chapter composed of four members who shall be appointed as follows: After this chapter shall become a law, the governor shall

Honorable Stephen R. Pratt

appoint for each of such counties four members of such board of election commissioners who shall hold their office until June 15, 1957, or until their successors are commissioned and qualified. Two commissioners shall be members of the political party polling the highest number of votes at the last general election for governor, and the other two commissioners shall be members of the political party polling the next highest number of votes for governor at said election. Successors shall be appointed in like manner and their terms of office shall be four years and until their successors are commissioned and qualified. In no case shall more than two members of said board belong to the same political party. In making the appointment of the commissioners the governor shall designate the commissioner who shall be the chairman of the board and the one who shall be secretary of the board; provided the chairman and secretary shall not both belong to the same political party. In case of a vacancy in said board from any cause whatsoever, it shall be filled in the same manner as in the case of the original appointment, save that the commissioner appointed for any unexpired term shall be a member of the same political party as the commissioner whom he succeeds, and in no case shall more than two members of said board belong to the same political party.

"2. Such commissioners shall be legal voters, residents of the state of Missouri for at least five years and of such county for a like term and be of approved integrity and capacity. They shall hold no other public office other than notary public and shall be ineligible to an elective or appointive office during their term of office, and shall before entering upon the duties of said office take and subscribe an oath to support the Constitution of the United States and of this state, and to demean themselves faithfully and impartially in office.

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"3. The said commissioners, or any one of them may be removed by the governor for violation of any provision of this chapter, or for any official misconduct; the governor first giving them, or either one of them as the case may be, not less than ten days notice in writing of all charges against them, or either of them, and affording them, or either of them, an opportunity of being publicly heard in person or by counsel in their or his own defense.

"4. Each commissioner shall give bond to the state in the sum of five thousand dollars with security to be approved by the governor, conditioned for the faithful and honest performance of the duties of said office and the care and preservation of the property thereof.

"5. Said oaths of office and bonds to be filed at the office of the secretary of state. Laws 1953, p. _____, S.B. No. 5, Sec. A(41)." (Emphasis ours).

It is now necessary to determine whether the post which you mention, viz., the office of president or vice-president of the Missouri Federation, Women's Democratic Club is a public office. We think that it is not a public office as contemplated in Paragraph 2 of Section 119.070. The Supreme Court of Missouri in State ex rel. Zevely, v. Hackmann, 254 S.W. 53, approved the following definitions of "public office" l.c. 55:

"A public office is defined to be--

"The 'right, authority, and duty, created and conferred by law, for which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.'"

* * *

"In the most general and comprehensive sense a 'public office' is an agency for the state,

Honorable Stephen R. Pratt

and a person whose duty it is to perform this agency is a 'public officer.' Stated more definitely, a 'public office' is a charge or trust conferred by public authority for a public purpose; the duties of which involve in their performance, the exercise of some portion of sovereign power, whether great or small. * * *

The posts of president and vice-president of the Missouri Federation, Women's Democratic Club, have not been created or conferred by law, nor do the persons holding such posts exercise any portion of the sovereign power, or act as agents of the state.

CONCLUSION

It is, therefore, the opinion of this office that a president or vice-president of the Missouri Federation, Women's Democratic Club is not disqualified from holding the office of election commissioner of Clay County, Missouri, by reason of holding such position in said Club.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:vlw

PUBLIC LIBRARIES: Sections 93.⁴³⁵ and 182.140, RSMo 1949, em-
SECOND CLASS CITIES: power a city of the second class to levy a
STATE AID: library tax according to procedure of each
TAXATION: section and that former section does not
supersede latter, as both are in effect. A
second class city, in order for its public library to be qualified
for state aid authorized by Par. 2, 181.060 RSMo 1949, must levy
a library tax under the provisions of either or both Sections
93.435 and 182.140 RSMo 1949. The tax rate must be equal to at
least one half maximum provided by both Sections, or tax income
must equal one dollar per capita for previous year according to
publication of latest federal census.

February 16, 1954

Honorable Paxton P. Price
State Librarian
Missouri State Library
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for
an official opinion of this department which reads as follows:

"This office would appreciate re-
ceiving answers to several legal
questions relating to the authority
and procedure of second class cities
in levying public library taxes.

"1. Does the authority granted to
second class cities in Section 93.435
R.S. Mo. 1949 supercede the procedure
authorized for setting library tax rates
in Section 182.140, R. S. Mo. 1949?

"2. Must a second class city levy
library taxes according to the author-
ity granted in Section 182.140 or Section
93.435, R.S. Mo 1949, in order for it to
qualify for state aid grants authorized
in Section 181.060, par. 2, R.S. Mo 1949?

"3. Does a second class city have the
authority to raise or set its library
tax rate by any other procedure than
is authorized in Section 182.140, R.S.
Mo. 1949?"

FILED

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Hon. Paxton P. Price

Section 182.140, RSMo 1949 referred to above reads as follows:

"When one hundred taxpaying voters of any incorporated city shall petition the mayor and common council asking that an annual tax be levied for the establishment and maintenance of a free public library and in such incorporated city, and shall specify in their petition a rate of taxation, not to exceed two mills on the dollar annually, and in cities of over one hundred thousand inhabitants not to exceed two-fifths of one mill annually on all the taxable property in the city, such mayor and common council shall direct the proper officer to give notice in his next legal notice of the annual election, or special election, which may be called for the purpose of voting on such question, that at such election every voter may vote

"For a _____ mill tax for a free public library,"

or

"Against a _____ mill tax for a free public library,"

specifying in such notice the rate of taxation mentioned in said petition; and if the majority of votes cast on such proposition shall be 'for the tax for the free public library,' the tax specified in such notice shall be levied and collected in like manner with other general taxes of such incorporated city, and shall be known as 'The Library Fund;' provided, that such tax shall cease in case the legal voters of any such incorporated city shall so determine by a majority vote at any annual election held therein."

Hon. Paxton P. Price

Section 93.435 RSMo 1949, also referred to above, reads as follows:

"1. The foregoing rate and limits fixed and prescribed in subdivision (2) of section 75.110 is the maximum rate the city council of any city of the second class shall have the power to levy for general municipal purposes; provided, however, that such city council may by ordinance levy and impose annually for general municipal purposes upon all property subject to its taxing powers a rate in excess of the rate and limits fixed and prescribed in said subdivision (2) but not to exceed in the aggregate forty cents on the one hundred dollars assessed valuation for any one or more of the following purposes, to wit: Library, hospital, public health, recreation grounds, and museum purposes; provided, however, that the rate and limitation fixed and prescribed for in said subdivision (2) for general municipal purposes may, in addition to the aforesaid rate and purposes of increase which may be voted by city ordinance, be further increased for such purposes for a period not to exceed four years at any one time when such rate and purpose of increase are submitted to a vote of the qualified electors within such cities and two-thirds of the qualified electors voting thereon shall vote therefor, but such increase so voted shall be limited to a maximum rate of taxation not to exceed thirty cents on one hundred dollars assessed valuation.

"2. The city council of any such cities is hereby empowered to call and conduct a special election under the laws governing such elections as herein contemplated and to submit thereat a proposition for increase of levy when in the opinion of such city council the necessity therefor arises, and may submit any such proposition at either a special or regular election and such proposition shall be submitted by such city council when petitioned therefor by qualified electors equaling in number five per cent or more of the qualified electors of such cities

Hon. Paxton P. Price

voting for mayor in the last city election at which a mayor was elected.

"3. The ballots shall be in substantially the following form:

() Forcent increase in tax levy on one hundred dollars valuation for general municipal purposes for . . . years.

() Against . . .cent increase in tax levy on one hundred dollars valuation for general municipal purposes for . . . years.

(Place an 'X' in the square opposite the one for which you wish to vote.)

"4. If such increase in levy shall be voted, then such increased levy shall be effective for the number of years designated, and no longer, but such cities through their city councils may submit any such proposal for continuing such increase of levy at any time for like periods not to exceed four years each."

Section 182.140 supra, provides a method by which at least one hundred taxpaying voters may petition the mayor and common council of any incorporated city for the levy of an annual tax, the proceeds of which may be used to establish and maintain a public library. As we construe the section, the legislative intent was that a library could be established and maintained under authority of this section, but that the method thus provided was never intended to be an exclusive one for levying a library tax.

Section 75.110, RSMo 1949, enumerates the powers of cities of the second class and also some limitations upon such powers, among which is that found in subdivision 2 of said section, prohibiting said cities from levying a general tax annually above the maximum rate specified therein. Said subsection reads as follows:

"(2) To levy and collect a general tax of not exceeding one per cent for each fiscal year upon all property in the city liable to taxation for state purposes and not by general law exempt

Hon. Paxton P. Price

from municipal taxation. The fiscal year shall commence on the first day of January of each year."

Paragraph 1, Section 93.435 supra, empowers the council of a second class city by ordinance to levy and impose an annual tax for general municipal purposes of not to exceed forty cents on the one hundred dollars assessed valuation for the purposes mentioned, including that for a public library. Said tax shall be in addition to the general tax rate of one dollar on the one hundred dollars assessed valuation authorized by subdivision 2, Section 75.110 supra.

Said paragraph 1, Section 93.435 supra, further provides that the tax authorized by subdivision 2 for general municipal purposes may, in addition to the tax rate and purposes provided (in the first part of the paragraph) when voted by city ordinance be further increased for a period of not to exceed four years for any one time, when submitted to the qualified voters at a special or regular election, at which election two thirds of the votes cast are for the increase in the tax rate. The maximum rate in such instance shall not exceed thirty cents on the one hundred dollars assessed valuation, and it is noted that the proceeds of the tax are to be used for general municipal purposes. Since no reference is made either expressly or by implication to the use of such tax proceeds for library purposes, it is believed that the legislative intent was that the tax was not to be a library tax, nor the proceeds of same are not to be used for that purpose. Consequently, this portion of Section 93.435, supra, has no reference to a library tax. It is our thought that that portion of paragraph 1, Section 93.435 supra, making a specific reference to a tax for library purposes is the only authority under the provisions of this section for levying a library tax, and that such tax rate shall not exceed the maximum specified, that is, forty cents on the one hundred dollars assessed valuation.

In answer to your first inquiry, it is our thought that the authority granted to cities of the second class under the provisions of Section 93.435 RSMo 1949, prescribing the procedure for fixing the library tax rate does not supersede that granted to them under the provisions of Section 182.140 RSMo 1949, but that both sections are in effect.

We understand the second inquiry in effect to be whether or not the library tax of a second class city must be levied, and the rate fixed according to the provisions of Section 93.435 supra,

Hon. Paxton P. Price

or Section 182.140 supra, in order for the library of such city to be qualified for state aid under the provisions of paragraph 2, Section 181.060 supra, which reads as follows:

"2. At least fifty per cent of the moneys appropriated for state aid to public libraries shall be apportioned to all public libraries established and maintained under the provisions of the library laws or other laws of the state relating to libraries. The allocation of such moneys shall be based on an equal per capita rate for the population of each city, village, town, township, school district, county, or regional library district in which any such library is or may be established, in proportion to the population according to the latest federal census of such cities, villages, towns, townships, school districts, county or regional library districts maintaining tax supported public libraries; provided, that no grant shall be made to any public library if the rate of tax or the appropriation for said library should be decreased below the rate in force at the time of the enactment of this chapter and provided further after January 1, 1949, grants shall be made to any public library, according to two alternate standards:

- (1) To any public library in which the tax rate is one-half or more of the maximum by law; or
- (2) To any public library for which the tax income yields one dollar or more per capita for the previous year according to the population of the latest federal census."

In our discussion of the first inquiry, and in answer to same, we gave it as our opinion that Section 93.435 did not supersede Section 182.140, but that both sections are in effect. Applying the principles underlying such opinion to the second inquiry, we shall endeavor in our further discussion to show that a tax shall be levied under either or both section and that the

Hon. Paxton P. Price

rates shall be at least one half the maximum rate provided by both so that the library may qualify for state aid grants under the provisions of Section 181.060 supra.

It is presumed that the general assembly knew the provisions of Sections 93.435 and 182.140, and that each section provides for a maximum rate in a different amount. It will be recalled that state aid shall be given to those libraries (Par. 2, Section 181.060) when, "the tax rate is one-half or more of the maximum (provided) by law, or * * * the tax income yields one dollar or more per capita for the previous year according to the population of the latest federal census." (Underscoring ours)

Upon a careful examination of this portion of the statute we are unable to find any indication of a legislative intent that state aid is to be given only to those libraries when the tax is levied under a certain section of the statutes to the exclusion of all other sections on the same subject. Rather it appears to be the legislative intent that the tax levied shall be at least one half the maximum rate provided by law, and which we construe to mean all laws. Sections 93.435 and 182.140 are the only ones which specifically prescribe the maximum library tax rate, and we construe said Par. 2, Section 181.060 supra, in this particular to mean that those libraries are entitled to state aid when the library tax has been levied under the provisions of either or both of Sections 93.435 and 182.140 and the rate is equal to at least one half the maximum provided by both sections, or the income from the library tax yields one dollar or more per capita for the previous year according to the population of the latest federal census.

It will be recalled that Section 93.435 supra, provides for a maximum tax rate of not more than forty cents (in the aggregate) on the one hundred dollar assessed valuation for one or more of the five purposes mentioned, including that for a public library.

Therefore, in answer to the second inquiry, it is our thought that a second class city must levy library taxes according to the provisions of either or both of Sections 93.435 RSMo 1949, and 182.140 RSMo 1949, and the tax rates levied must be at least one half the maximum provided by both sections in order for the public library to qualify for state aid grants as provided by Par. 2, Section 181.060, RSMo 1949.

Hon. Paxton P. Price

For the reasons given above and in answer to the third inquiry it is our thought that a second class city must fix its library tax rate according to the procedure provided by either or both of Sections 93.435 RSMo 1949, and 182.140 RSMo 1949.

CONCLUSION

It is the opinion of this department:

1. Sections 93.435 and 182.140 RSMo 1949, each empowers a city of the second class to levy a library tax in accordance with the procedure prescribed by each section, and that the former section does not supersede the ~~later~~, *latter*, as both sections are in effect.

2. A city of the second class, in order for its public library to be qualified for state aid grants authorized by Par. 2, Section 181.060, RSMo 1949, must levy a library tax under the provisions of either or both of Sections 93.435 and 182.140 RSMo 1949, and the tax rate must be at least one-half the maximum provided by both sections, or the tax income must be equal to one dollar per capita for the previous year, according to the population of the latest federal census.

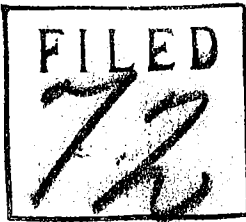
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC:sm

DISMISSAL OF AN APPEAL: It is the opinion of this department that a person who has been convicted of a misdemeanor in magistrate court and who has perfected an appeal to the circuit court, may dismiss his appeal, after which the judgment of the magistrate court is reinstated and becomes of full force and effect.



March 25, 1954

Honorable Stephen R. Pratt
Prosecuting Attorney
Clay County
Courthouse
Liberty, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"We have been asked by Judge James S. Rooney, Judge of the Seventh Judicial Circuit, for your opinion on the following question.

"In the case of a conviction for misdemeanor in the Magistrate Court, where said conviction is appealed to the Circuit Court by the defendant, and transcript filed in the office of the Circuit Clerk, may the defendant dismiss the appeal and pay the fine issued by the Magistrate or serve the sentence, whichever the case may be, or is it necessary after transcript has been filed on such a case in the Circuit Court, that there be a disposition of same either by trial or a plea of guilty in that court?"

In your above letter you state that "said conviction is appealed to the circuit court by the defendant, and a transcript filed in the office of the Circuit Clerk. . ."

We note that the filing in circuit court of a transcript of the proceedings in magistrate court is only one of a number of necessary steps in perfecting an appeal from a conviction for a misdemeanor in magistrate court to the circuit court. These necessary steps are set forth in Section 543.290, 543.300, and 543.310, RSMo. 1949. However, from your statement that "said

Honorable Stephen R. Pratt

conviction is appealed to the circuit court by the defendant," we will assume that all of the steps necessary to perfect this appeal were taken in addition to the filing of the transcript, and that the appeal was taken and perfected.

This being the situation, the first question which we have to answer is, when such an appeal as we have discussed above is perfected, can the appellant dismiss his appeal?

On this matter Corpus Juris Secundum, Volume 24, page 646, Section 1821, states:

"Allowance of withdrawal of an appeal is generally considered to be discretionary with the court; but some authorities consider it to be a right personal to the appellant.--The rule in most jurisdictions seems to be that accused is not entitled to withdraw the appeal as a matter of right, and that the question of withdrawal is largely within the discretion of the court, except perhaps in cases where the consent of the adverse party is obtained. So, to withdraw the appeal it is necessary that appellant obtain a court order, and there can be no withdrawal merely by his conduct. Appellant's application to dismiss will not be granted where this would permit an abuse of the processes of the law; but it will be granted if the court, after reviewing both the law and the evidence, finds no error, or, where the motion is by the state, if the information is fatally defective. According to some authorities, unless good cause is shown to the contrary, appellant may waive the right to appeal and have the appeal dismissed on his own motion, the right being considered a personal one to him. Likewise, in other jurisdictions the appeal is considered to be a voluntary matter which may be voluntarily abandoned at any time, and on appellant's compliance with the rules of court requiring that his application be made in person by affidavit signed and sworn to by him, the court will

Honorable Stephen R. Pratt

dismiss the appeal. It has been held that appellant's request in this regard will be complied with although it entails the withdrawal of an opinion of affirmance; but there is authority to the effect that an appeal cannot be dismissed on appellant's request where the appellate court has written and filed an opinion therein. A sworn request of this character may not be withdrawn on the ground that it was made under a delusive hope of pardon."

No Missouri cases are cited under the above section, which deals with appeals in criminal cases.

We here call attention to the case of Bench v. Watts, 109 S.W. 2d 893, decided by the Springfield Court of Appeals in 1937. In that opinion the court stated:

"This action, in the nature of an injunction, was tried in the circuit court of Christian county, at the regular January term thereof, 1936, resulting in a judgment for the defendant. The injunction was dissolved and plaintiff's petition was dismissed. Thereafter, on the same day, plaintiffs filed a motion for a new trial and the cause was continued on motion. On May 27, 1936, the same being the first judicial day of the May term of said Christian county circuit court, the motion for a new trial was overruled, and on the same day plaintiffs duly took an appeal to this court.

"The appellants have filed in this court their motion to dismiss the appeal. This case belongs to the class of cases wherein the appeal can be dismissed, after once having been taken, and the appeal is therefore dismissed, upon motion and request of appellants."

We now direct attention to the case of McCord v. State, 239 S.W. 2d 822, a Texas case decided in 1951. In that opinion the court said:

Honorable Stephen R. Pratt

"The conviction is for the offense of the unlawful failure to stop and render aid after an automobile collision. The penalty assessed is confinement in the county jail for a period of six months and a fine of \$500.

"Since perfecting his appeal, appellant has filed a written motion, duly verified, requesting the dismissal thereof. The motion is granted and the appeal is dismissed."

In view of the above, and of the lack of specific holdings on this point in Missouri, we believe that it can be said that a person who has perfected an appeal to the circuit court from a misdemeanor conviction in magistrate court, may dismiss his appeal.

Having held that an appellant to the circuit court from a conviction for a misdemeanor in magistrate court, could dismiss his appeal, the next question with which we are confronted is the situation of such an appellant after his appeal has, by his own motion and with the consent of the circuit court, been dismissed. We believe that in such a situation the judgment of the magistrate court would be reinstated and would become of full force and effect.

In this regard we direct attention to the case of State v. Reed, 206 Missouri 719, a case decided by the Missouri Supreme Court in 1907. In that opinion the court stated:

"A prosecution was commenced by the prosecuting attorney of Butler county by information against the defendant for an assault with intent to kill Judge Jesse C. Sheppard, on December 3, 1906. Judge W. N. Evans of an adjoining circuit was called in to try the cause, on account of the disqualification of Judge Sheppard. Defendant was duly arraigned and pleaded not guilty, was tried and convicted and his sentence assessed at two years in the penitentiary and he was sentenced accordingly. From that sentence he appealed to this court but after the cause had been briefed for the State the

Honorable Stephen R. Pratt

defendant and his attorney filed a formal dismissal of his appeal, thus leaving the judgment of the circuit court in full force and effect."

The above case is, obviously, further authority for our position that an appellant may dismiss his appeal, and for our further position that such a dismissal reinstates the judgment of the lower, in this case magistrate, court.

In this regard we would also call attention to the case of *McAnaw v. Matthis*, 129 Missouri 142, which at l.c. 152 stated:

"When the appeal was finally dismissed, the original judgment came into force again, by virtue of the principles of our system of procedure, which have been elucidated in *Lewis v. Railroad* (1875), 59 Mo. 495. It is true that a justice's judgment is distinguishable from a judgment of the circuit court (considered in that case) in that the former is opened up for a new trial of the cause if the appeal becomes ultimately operative; but if the appeal be dismissed finally, the first judgment is then good, for what it is worth as it stood originally; or, at least, it forms a sound basis on which to found an execution to enforce it, in the court where a transcript thereof has been filed, which is the question now before us."

We would also call attention to the case of *Pullis v. Pullis*, 157 Mo. 565, which case holds that where a defendant appeals from the judgment of a justice of the peace, and his appeal is dismissed for failure to file the requisite appeal bond, the judgment of the justice is left in full force. We would also call attention to the case of *Walther v. Woodson*, 190 S.W. 61, which at l.c. 62 states:

"The appeal on the merits and on the question of costs removed the entire case bodily to the circuit court for trial de nove, without regard to any error or imperfection in the judgment below. *Hull v. Beard*, 80 Mo. App. 200. And it vacated the judgment, at

Honorable Stephen R. Pratt

least until the appeal was disposed of; but on dismissal of the appeal the judgment, or whatever portion of it is valid, became a finality. Sublette v. St. Louis, etc., R. Co., 96 Mo. App. 113, 69 S.W. 745; Pullis v. Pullis, 157 Mo. 565, 587, 590, 57 S.W. 1095."

It is, therefore, our opinion, in view of the above, that when an appeal is dismissed that the judgment of the lower court is reinstated.

CONCLUSION

It is the opinion of this department that a person who has been convicted of a misdemeanor in magistrate court and who has perfected an appeal to the circuit court, may dismiss his appeal, after which the judgment of the magistrate court is reinstated and becomes of full force and effect.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW/vtl

not
Digest

ST. LOUIS

POLICE

: Board of Police Commissioners of the City of
: St. Louis has no power to increase the
: compensation of commissioned personnel of the
: St. Louis Police Department; nor does it have
: the power to pay to such personnel a "cost of
: living" bonus.

FILED

72

June 17, 1954

Board of Police Commissioners
1200 Clark Avenue
St. Louis, Missouri

Attn: Honorable Jeremiah O'Connell, Chief of
Police.

Gentlemen:

We have your opinion request of June 7, 1954,
which request reads as follows:

"At the meeting of the Board of Police Commissioners, the Board directed me to write you for an opinion re salaries received by the commissioned personnel of the St. Louis Police Department. All commissioned personnel of our department are now receiving the salaries specified in the Revised Statutes of Missouri, 1949, as amended 1951.

"You will note that subparagraph 2 of the Revised Statutes of Missouri, Chapter 84.160, states the rate of salary therein provided shall not be less than the amounts provided. However, it does not state whether or not the Board has the authority to increase the salaries over and above the amounts provided in said section and the Board would like an opinion as to whether or not it has the authority to increase salaries over the amount specified in Section 1.

"The Board would also like to have an opinion of the legality of paying a 'Cost of Living Bonus' over and above the regular salaries of the commissioned personnel of the Police Department."

Board of Police Commissioners,
Attn: Honorable Jeremiah O'Connell:

Section 84.160, Laws of Missouri, 1951, page 323,
to which you refer in your letter, reads as follows:

"The chief of police shall receive ninety-five hundred dollars per annum; the assistant chief of police shall receive seventy-one hundred dollars per annum; the chief of detectives shall receive seven thousand dollars per annum; the inspector of police shall receive seven thousand dollars per annum; each major shall receive sixty-five hundred dollars per annum; each captain shall receive fifty-six hundred dollars per annum; each lieutenant shall receive five thousand dollars per annum; each sergeant who has served more than five years as a sergeant shall receive four thousand four hundred forty dollars per annum; each sergeant who has served five years or less as a sergeant shall receive four thousand three hundred twenty dollars per annum; each corporal who has served more than five years as a corporal shall receive four thousand eighty dollars per annum; each corporal who has served five years or less as a corporal shall receive three thousand nine hundred sixty dollars per annum; each patrolman during his first year of service as a patrolman shall receive three thousand six hundred sixty dollars per annum; during his second year of service he shall receive three thousand seven hundred twenty dollars per annum; during his third year of service he shall receive three thousand seven hundred eighty dollars per annum; during his fourth year of service he shall receive three thousand eight hundred forty dollars per annum; each probationary patrolman shall receive three thousand four hundred eighty dollars per annum; each turnkey shall receive three thousand dollars per annum. Each of the above-mentioned salaries shall be payable in

Board of Police Commissioners,
Attn: Honorable Jeremiah O'Connell;

semi-monthly installments. The rate of the salaries herein provided shall not be less than the amounts provided, and any act of the municipal assembly or common council of said cities tending to lower the above shall be null and void. It shall be the duty of the municipal assembly or common council of said cities to make the necessary appropriation for the expenses of the maintenance of said police force in the manner herein and hereafter provided."

We have concluded that neither said section, nor any other statute we have discovered, gives the Board any authority to raise the salaries of commissioned personnel above that specified therein.

The rule respecting the amount of compensation of public officers is thus stated in 43 Am. Jur., Public Officers, Section 341, page 134:

"Any right which a public officer may have to a salary or compensation must generally be found in some provision of the law, for whatever may be the character of the compensation, whether an annual salary, a per diem allowance, or fees for particular services, it must depend upon the will of the people speaking through their Constitution, statutes, or ordinances. * * *."

The statute quoted above provides that a given officer "shall receive" a specified salary. It does not provide that such officer shall receive "not less than" such sum, or "not more than" such sum. It sets the salary, not the upper or lower limits of such salary.

We do not believe the provision that such salaries "shall not be less than the amounts provided" impliedly gives any body the power to provide salaries greater in amount.

By the same reasoning the Board does not have the power to pay a "cost of living" bonus to the commissioned personnel of the St. Louis Police Department.

Board of Police Commissioners,
Attn: Honorable Jeremiah O'Connell:

CONCLUSION

It is the opinion of this office that the Board of Police Commissioners of the City of St. Louis has no power to increase the compensation of commissioned personnel of the St. Louis Police Department above that specified in Section 84.160, Laws of Missouri, 1951, page 323; nor does it have the power to pay to such personnel a "cost of living" bonus.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Don Kennedy.

Very truly yours,

JOHN M. DALTON
Attorney General

WDK:irk

VETERANS:
TAXATION:

A motor vehicle owned by a veteran, who is a legal resident of Missouri, is subject to taxation although \$1600.00 of the purchase price of the motor vehicle was supplied by the administration of veterans' affairs.

FILED

72

October 8, 1954

Honorable Stephen R. Pratt
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"In confirmation of our telephone conversation of this date, the opinion which I desire is based on the question of whether or not a veteran, who has been furnished an automobile by the government due to the loss of one or both of his legs, is taxable in the laws of the State of Missouri. I believe this is covered under Title 38, Chapter 5, Section 252 U.S.C.A."

Section 252a et seq. of Chapter 5, Title 38, U.S.C.A. provides that the administration of veterans' affairs is authorized to pay up to \$1600.00 on the purchase price of an automobile for veterans with certain physical disabilities acquired in service.

It is plain from the above that this is an absolute and unqualified gift to the veteran; that title to the motor vehicle vests absolutely in him; and that he holds this motor vehicle on the same basis as though he had purchased it outright with his own money. Such being the case, we must look to the law of Missouri to see whether such a person is exempt from paying taxes on such a vehicle. Section 137.100 RSMo 1949, sets forth the real and personal property which is exempt from taxation. A motor vehicle owned by a veteran who is a legal resident of Missouri, and acquired as set forth in your letter, is not exempt by the above section, and is, therefore, we believe, subject to taxation.

CONCLUSION

It is the opinion of this department that a motor vehicle owned by a veteran, who is a legal resident of Missouri, is subject

Honorable Stephen R. Pratt

to taxation although \$1600.00 of the purchase price of the motor vehicle was supplied by the administration of veterans' affairs.

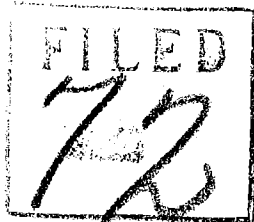
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

COUNTY: County's classification changes if assessed valuation requirements are met although the
STATE AUDITOR: State Auditor does not formally notify the county of such fact. The State Auditor may notify the county beyond the thirty-day period prescribed by Sec. 48.040, RSMo 1949, of changing classification.



November 22, 1954

Honorable Stephen R. Pratt
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request is as follows:

"I wish to request your official opinion on the following matter:

"Clay County is a county of the third class and has had an assessed valuation of more than \$50,000,000.00 for seven successive years. Sections 48.020, 48.030 and 48.040 V.A.M.S. of Missouri are the pertinent statutes in question. Section 48.030 provides 'that the change from one classification to another shall become effective at the beginning of the county fiscal year following the next general election after the certification for the state equalizing agency for the fifth successive year that said county possess an assessed valuation placing it in another class.' It is my understanding that said certification has been made for the state equalizing agency. However, the state auditor has failed to notify officially all county elected officers and the county officials charged with the supervision of elections of the change in status of the county.

"Does the mere failure of the state auditor to comply with the duty, as set forth in Section 48.040, V.A.M.S. of Missouri, prevent Clay County from becoming a second class county on January 9, 1955?

Honorable Stephen R. Pratt

"If such duty on the part of the state auditor is merely administrative or advisory, then can such defect be cured by a notification of the change in classification at this date?"

By Section 48.020, RSMo 1949, counties having an assessed valuation of fifty million dollars and less than three hundred million dollars are second class counties.

Section 48.030, RSMo 1949, provides:

"For the purpose of determining the initial class of the various counties, the assessed valuations of the respective counties as set forth on pages 333 to 400 of the 'Journal of the Board of Equalization of the State of Missouri for the Year Ending December 31, 1944' shall be used; provided, however, that hereafter no county shall be deemed as moving from a lower class to a higher class or from a higher class to a lower class until the assessed valuation of said county shall have been such as to place it in such other class for five successive years; provided further, that the change from one classification to another shall become effective at the beginning of the county fiscal year following the next general election after the certification by the state equalizing agency for the fifth successive year that said county possesses an assessed valuation placing it in another class; provided further, that if a general election shall be held between the date of such certification and the end of the current fiscal year, such change of classification shall not become effective until the beginning of the county fiscal year following the next succeeding general election."

Section 48.040, RSMo 1949, provides:

"It shall be the duty of the state auditor, as the supervisor of county audits, to examine annually the assessed valuation figures of the various counties immediately upon the certification of same by the state equalizing agency and to ascertain if any county shall have

Honorable Stephen R. Pratt

changed classifications as determined in this chapter. In case it shall be found that any county has met the requirements of reclassification as set forth in this chapter, it shall be the duty of the state auditor within thirty days after said certification to notify officially all county elected officers and the county officials charged with the supervision of elections of the change in status of the county."

It is apparent from these provisions that the essential matter to be determined in ascertaining whether or not a county has changed from one classification to another is whether or not the state equalizing agency, which is the State Tax Commission, has found that the county has possessed for five successive years an assessed valuation which places it in another class. Insofar as this determination is concerned, the State Auditor performs no duties whatsoever; his only function is a ministerial one; he notifies the county upon examination of the valuation figures certified by the State Tax Commission.

Under such circumstances we are of the opinion that the mere failure of the State Auditor to comply with the requirements of Section 48.040 and notify the county of its change in classification does not prevent a county which has met with the requirements of Section 48.030 from changing its classification. This, of course, rests on the assumption that the State Tax Commission has made the required finding regarding the assessed valuation of the county.

As for your second question, as pointed out above the State Auditor's duty in regard to the change of classification of a county is purely a ministerial one. No discretion whatsoever is conferred upon him regarding the matter. He merely looks at the figures which have been previously ascertained by the State Tax Commission. Under such circumstances we are of the opinion that the failure of the State Auditor to act within the thirty-day period could not prevent a county's classification being changed if it meets the requirements of the statute.

The following statement from 3 Sutherland, Statutory Construction, 3rd Edition, 1943, page 102, is quoted with approval of the Missouri Supreme Court in the case of State ex rel. School District v. Holmes, 253 S.W. (2d) 402, 1.c. 404:

"For the reason that individuals or the public should not be made to suffer for

Honorable Stephen R. Pratt

the dereliction of public officers, provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the officer."

In that case the Supreme Court held that the failure of a school district to submit a plan of reorganization to the State Board of Education within the time limited by statute (Sec. 165.673(2), RSMo 1949) did not invalidate the reorganization in accordance with such plan.

In the case of State ex inf. Dalton v. Dearing, 263 S.W. (2d) 381, the Supreme Court held that a delay by the Governor beyond the time fixed by Section 30(a) (b) of Article VI of the Constitution of Missouri, 1945, in the appointment of the nineteenth member of board of freeholders chosen to prepare a plan for the administration of mass transportation services in a metropolitan area, did not invalidate the appointment.

We think that the principle applied by the Supreme Court in those cases is applicable in the situation here presented. Certainly no prejudicial result could follow from the State Auditor making his certification beyond the thirty-day period prescribed by Section 48.040, supra.

CONCLUSION

Therefore, it is the opinion of this office that the failure of the State Auditor to notify a county that the State Tax Commission has found for five successive years that its assessed valuation is such as to require a change in the classification of such county in accordance with Section 48.030, RSMo 1949, does not prevent the change in classification of such county from becoming effective.

We are further of the opinion that the failure of the State Auditor to notify the county within thirty days as required by

Honorable Stephen R. Pratt

Section 48.040, RSMo 1949, can be remedied by a notification to the county subsequent to the expiration of said thirty-day period.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

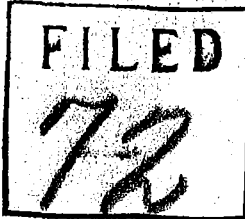
Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

CRIMINAL SEXUAL PSYCHOPATHS:
STATE HOSPITALS:
MAGISTRATE COURTS:
JURISDICTION OF MAGISTRATE
COURTS:

Magistrate courts have jurisdiction to proceed against one properly charged before such court with the commission of a crime under the Criminal Sexual Psychopath Act, and to commit such person to the State Hospital at Fulton, Missouri pursuant to said Act.



December 27, 1954

Mr. R. P. Price, M. D.
Acting Superintendent
State Hospital No. 1
Fulton, Missouri

Dear Mr. Price:

This will acknowledge receipt of your letter of December 10, 1954, wherein you request an opinion of this office on the following question:

"We would appreciate an opinion from your office on the following matter: if an individual is charged in the Magistrate Court, (Boone County) as being a criminal sexual psychopath, by that court, can he be properly committed by that court to this hospital."

Section 202.710 RSMo 1949 provides that "when any person is charged with a criminal offense" and certain things appear to the prosecuting attorney, certain procedures shall be followed under the Criminal Sexual Psychopath Act. Thus it appears that in any court in which a person is charged with a criminal offense, the provisions of the Criminal Sexual Psychopath Act may become applicable and the court before which such person is charged shall have jurisdiction to proceed under said Act.

By Section 556.010 RSMo 1949, the term "criminal offense" is defined to embrace both misdemeanors and felonies. Likewise, in the case of *Myles v. St. Louis Public Service Company*, 52 SW2d 595, the St. Louis Court of Appeals held that the term "criminal offense" applies to misdemeanors as well as to felonies.

By Section 543.010 RSMo 1949, magistrate courts (with exceptions not applicable here) have concurrent original jurisdiction, co-extensive with the boundaries of their counties, with the circuit court in all cases of misdemeanors.

Mr. R. P. Price, M. D.

Therefore, if one were charged with a misdemeanor, the magistrate court in Boone County would have jurisdiction of the subject-matter and such charge of misdemeanor would constitute a "criminal offense" as that term is used in Section 202.710 RSMo 1949, and the magistrate court would be authorized under such section and the other sections comprising the Criminal Sexual Psychopath Act to proceed under said Act, and in a proper case to commit the person charged to State Hospital No. 1 at Fulton, Missouri, under the provisions of said Criminal Sexual Psychopath Act.

CONCLUSION

It is, therefore, the conclusion of this office that the Magistrate Court of Boone County, Missouri has jurisdiction to, and may commit, a person charged before it with the commission of a misdemeanor to State Hospital No. 1 at Fulton, Missouri, under the Criminal Sexual Psychopath Act.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Very truly yours,

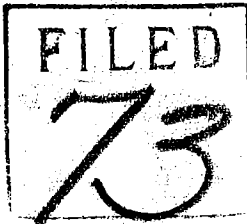
John M. Dalton
Attorney General

FLH:sm

STATE HOSPITALS:

APPROPRIATIONS:

The expense of a survey of the 5 State Mental Hospitals by the Central Inspection Board of the American Psychiatric Association is not comprehended within "ordinary and necessary operating expenses" or "ordinary and necessary expenses" within the meaning of the appropriations for "operations" contained in House Bill No. 383, 67th General Assembly.



May 5, 1954

Honorable B. E. Ragland
Director
Division of Mental Diseases
Department of Public Health and
Welfare
State Office Building
Jefferson City, Missouri

Dear Sir:

We render herewith our opinion based upon your request of April 22, 1954, which request reads as follows:

"This division is contemplating requesting the Central Inspection Board of the American Psychiatric Association to make a survey of the five state mental hospitals in the division, namely: State Hospital No. 1, Fulton, State Hospital No. 2, St. Joseph, State Hospital No. 3, Nevada, State Hospital No. 4, Farmington, and the St. Louis State Hospital, St. Louis.

"I request an official opinion on the following question:

"Can the expense of this survey be paid out of the appropriation for 'Operations' made to the several state hospitals?

"I would appreciate an early reply to this request."

In answering your request it is necessary to refer to the Appropriation Bills by which appropriations for "operations" are made to the several state hospitals. The appropriations for the hospitals are made by House Bill No. 383, 67th General Assembly.

Honorable B. E. Ragland:

The appropriation for State Hospital No. 1 is contained in Section 5.110 thereof. The "operation" item reads as follows:

"Operation:

"General expense: communications, printing, and binding, other operative expenses, materials and supplies for operation of hospitals, farms and dairies connected therewith, travel within and without the state and other ordinary and necessary expense 955,000.00"

The same section further appropriates from the Hospital Fund a further operation item reading as follows:

"Operation:

"General expense: communications, printing and binding, travel within and without the state, materials and supplies for operation of hospitals, and other ordinary and necessary expense 675,000.00"

The appropriation for State Hospital No. 2 is contained in Section 5.120 thereof. From the General Revenue Fund the "operation" appropriation is expressed in these words:

"Operation:

"General expense: communications, printing and binding, insurance and premiums on bonds, travel within and without the state, and other operating expenses, materials and supplies for operation of hospitals, and farms and dairies connected therewith, including labor at dairy and farms . . . 947,000.00"

From the Hospital Fund the appropriation is expressed in these words:

Honorable B. E. Ragland:

"Operation:

"General expense: including communication, printing and binding, insurance and premiums on bonds, travel within and without the state, and other operating expenses, materials and supplies for operation of hospitals and farms and dairies connected therewith, and other ordinary and necessary expense 578,000.00"

Section 5.130 appropriates to State Hospital No. 3 out of the General Revenue Fund for "operation" as follows:

"Operation:

"General expense: including communication, printing and binding, material and supplies for operation of hospitals and farms and dairies connected therewith, travel within and without the state, and other ordinary and necessary expenses 916,000.00"

From the Hospital Fund the "operation" appropriation is worded as follows:

"Operation:

"General expense: communication, printing and binding, travel within and without the state, materials and supplies for operation of hospitals and farms and dairies connected therewith, and other ordinary and necessary expenses 490,000.00"

Section 5.140 appropriates to State Hospital No. 4 out of the General Revenue Fund for "operation" as follows:

"Operation:

Honorable B. E. Ragland:

"General expense: communication, printing and binding, materials and supplies for operation of hospitals and farms and dairies connected therewith, and other ordinary and necessary operating expenses 721,000.00"

From the Hospital Fund the "operation" appropriation is worded as follows:

"Operation:

"General expense: communication, printing and binding, travel within and without the state, and supplies for operation of hospitals, farms and dairies connected therewith, and other ordinary and necessary expenses 575,000.00"

For the St. Louis State Hospital by Section 5.160 the "operation" appropriation from the General Revenue Fund is worded as follows:

"Operation:

"General expense: communication, printing and binding, travel within and without the state, materials and supplies for operation of the hospital and other ordinary and necessary expenses . . . 1,415,000.00"

From an examination of these appropriations we see that the survey which you contemplate having made is not specifically covered in any of these items. The question then is whether it would come within "other ordinary and necessary expenses" or "other ordinary and necessary operating expenses", some such phrase appearing in each "operation" appropriation.

We believe that the expense of the contemplated survey would not properly be considered a necessary or ordinary operating expense within the meaning of the language of this Bill.

Honorable B. E. Ragland:

In construing such general terms found in the statutes the Courts hold that they are limited by specific words. The rule is thus stated in 50 Am. Jur. Stat., Section 249:

"* * * Similarly, in accordance with what is commonly known as the rule of ejusdem generis, where, in a statute, general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designation and as including only things or persons of the same kind, class, character, or nature as those specifically enumerated. The general words are deemed to have been used, not to the wide extent which they might bear if standing alone, but as related to words of more definite and particular meaning with which they are associated. In accordance with the rule of ejusdem generis, such terms as 'other,' 'other thing,' 'other persons,' 'others,' 'otherwise,' or 'any other,' when preceded by a specific enumeration, are commonly given a restricted meaning and limited to articles of the same nature as those previously described. * * *."

You will note that the "operation" item in each section of House Bill No. 383, 67th General Assembly, specifically mentions communication, printing and binding, travel, materials and supplies and other items. The survey which is contemplated is not of the same general nature as the items specifically mentioned.

CONCLUSION.

We conclude therefore that the expense of a survey of the five State Mental Hospitals by the Central Inspection Board of the American Psychiatric Association

Honorable B. E. Ragland:

is not comprehended within "ordinary and necessary operating expenses" or "ordinary and necessary expenses" within the meaning of the appropriations for "operations" contained in House Bill No. 383, 67th General Assembly.

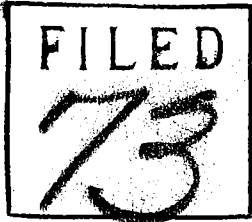
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON
Attorney General

WDK:irk

SPECIAL ROAD DISTRICT:
ROAD AND BRIDGE TAX:



A law which requires that a portion of the money produced by the levying of a tax under authority of the first sentence of Section 12(a) of Article X, of the Constitution of Missouri, 1945, be paid over in whole or in part to a special road district, in proportion to the amount of money produced by tax of the property within such special road district, is constitutional.

July 26, 1954

Honorable William M. Quinn
Senator, 18th District
Maywood, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Art. X, Sec. 12, provides among other things that the county court may levy, or authorize, the collection of a tax not to exceed 35¢ on the \$100.00 assessed valuation for road and bridge purposes.

"Sometime ago the legislature passed a law requiring that a portion of this money produced by the levying of such tax for road and bridge purposes, be turned over, or paid, to special road districts in each county. What I would like to know, under the provisions of Art. X, Sec. 12, of the Constitution of Missouri 1945, is whether or not such a law is constitutional.

"It occurs to me that the purpose of the framers of the constitution was, that the money produced by the levy of the county court, authorized under the provisions of this section, was that it should be expended and controlled by the county court, and that any special road district is not entitled to any part of the same, and that any law passed for that purpose would be unconstitutional.

"I am herewith requesting an official opinion by your office regarding Art. X, Sec. 12, relating to this subject."

Honorable William M. Quinn

Section 12(a) of Article X, of the Constitution of Missouri 1945, to which you refer, reads as follows:

"In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. In addition to the above levy for road and bridge purposes, it shall be the duty of the county court, when so authorized by a majority of the qualified electors of any road district, general or special, voting thereon at an election held for such purpose, to make an additional levy of not to exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes, and placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law."

From the above it is clear that under Section 12(a), of Article X, supra, two separate and distinct levies, neither of which may exceed 35¢ on the one hundred dollars assessed valuation, may be made. The first sentence in the above section authorizes the governing body of a county to make such a levy upon its own initiative, and in the exercise of its own discretion solely. The second sentence makes it the duty of the county court to make an additional levy of not more than 35¢ on the one hundred dollars assessed valuation in any general or special road district, when authorized to do so by a vote of a majority of the qualified electors in such road district voting in an election held for such purpose.

The law to which you refer, "a law requiring that a portion of this money produced by the levying of such tax for road and bridge purposes be turned over or paid to special road districts in each county," undoubtedly is Section 137.555 RSMo 1949, which reads as follows:

Honorable William M. Quinn

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government, and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village."

This Section 137.555, supra, clearly is based upon the first sentence of Section 12(a), of Article X, of the Constitution of Missouri 1945, supra.

We now direct attention to Section 22, of Article X, of the 1875 Constitution of Missouri, which reads as follows:

"In addition to taxes authorized to be levied for county purposes under and by virtue of section 11, article 10 of the Constitution of this State, the county court in the several counties of this state not under township organization, and the township board of directors in the several counties under township organization, may, in their discretion, levy and collect, in the same

Honorable William M. Quinn

manner as State and county taxes are collected, a special tax not exceeding twenty-five cents on each \$100 valuation, to be used for road and bridge purposes, but for no other purpose whatever; and the power hereby given said county courts and township boards is declared to be a discretionary power."

It will be noted that the above Section 22, of Article X, of the 1875 state Constitution of Missouri is almost identical with the first sentence of Section 12(a) of Article X, of the Constitution of Missouri 1945, supra. The main difference between the two sections is that the maximum amount of levy is increased from 25¢ under the old constitution to 35¢ under the new.

We now direct attention to Section 10482 RSMo 1909, as amended by L. Mo. 1913, Vol. 1, p. 669, which reads:

"Special road and bridge fund.-- In addition to the levy hereinbefore authorized to be made, the county courts of the several counties of this state, other than those under township organization, may, in their discretion, levy and collect, in the same manner as state and county taxes are collected, a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purpose whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county: Provided, however, that in counties in this state in which a special road district exists, or shall exist, or where special road districts exist, or shall exist, as provided for by the laws of this state in article VI of chapter 102 of the Revised Statutes of Missouri, 1909, all that part or portion of said taxes herein mentioned and provided for which shall arise from and be collected and paid upon any property lying and being within such special road district, or districts, shall, by said county courts, be apportioned to such special road district, or districts, from which said tax was collected, and shall, when collected, upon written application by the commissioners of such special road district, or districts, be paid to said commissioners of such special road district, or districts, by said county courts, by warrants drawn upon the county treasurer, payable to said commissioners, or the treasurer of said special road district, or districts; and all said sums of money so apportioned to said special road district, or districts, and so paid over to the commissioners thereof, or the treasurer thereof, shall be used and

Honorable William M. Quinn

expended by said special road district, or districts, by the commissioners thereof for road and bridge purposes, but for no other purpose whatever, and the county court shall apportion to all other road districts all taxes collected from property in such districts."

It will be noted that the above section is very similar to Section 137.555, supra. Section 10482, supra, relates only to counties not under township organization, as does Section 137.555, supra. It will be noted that both kinds of counties are embraced in above Section 22, of Article X, of the 1875 Constitution, and also Section 12(a), of Article X, of the Constitution of Missouri 1945.

It will be further noted that Section 10482, supra, provides that when a levy is made, as provided by that section, and as is provided by Section 137.555, supra, that all of the money raised from assessments made on property located in a special road district shall be returned to the district, whereas Section 137.555, supra, provides that four-fifths of such money shall be returned to the special road district.

We here direct attention to Section 137.585 RSMo 1949, which reads:

"1. In addition to other levies authorized by law, the township board of directors of any township in their discretion may levy an additional tax not exceeding thirty-five cents on each one hundred dollars assessed valuation in their township for road and bridge purposes. Such tax shall be levied by the township board, to be collected by the township collector and turned into the county treasury, where it shall be known and designated as a special road and bridge fund.

"2. The county court of any such county may in its discretion order the county treasurer to retain an amount not to exceed five cents on the one hundred dollars assessed valuation out of such special road and bridge fund and to transfer the same to the county special road and bridge fund; and all of said taxes over the amount so ordered to be retained by the county shall be paid to the treasurers of the respective townships from which it came as soon as practicable after receipt of such funds, and shall be designated as a special road and bridge fund of such township and used

Honorable William M. Quinn

by said townships only for road and bridge purposes, except that amounts collected within the boundaries of road districts formed in accordance with the provisions of chapter 233, RSMo 1949 shall be paid to the treasurers of such road districts; provided that the amount retained, if any, by the county shall be uniform as to all such townships levying and paying such tax into the county treasury; provided, further, that the proceeds of such fund may be used in the discretion of the township board of directors in the construction and maintenance of roads and in improving and repairing any street in any incorporated city, town or village in the township, if said street shall form a part of a continuous highway of the township running through said city, town or village."

Let us now turn our attention to the 1916 case of State v. Burton, 266 Mo. 711. Here the County Court of Randolph County, acting under Section 10482, RSMo 1909, as amended by Laws of 1913, quoted above, made a levy of 25¢ on the one hundred dollars assessed valuation of all property in Randolph County for road and bridge purposes.

In the Moberly Special Road District, the sum thus collected amounted to \$9334.60. Subsequently, the Moberly Special Road District filed mandamus against the County Court of Randolph County to compel the county court to pay over to the Moberly Special Road District this entire sum of \$9334.60. In answer, the Supreme Court affirmed Section 10482 RSMo 1909, as amended by Laws of 1913, supra, as constitutional. The court arrived at the conclusion that the aforesaid section was constitutional. In so holding, the court in conclusion stated at l.c. 723:

"In view of all of the foregoing, we hold that the statutes in question do not, within the meaning of the Constitution, authorize the granting of public money to a corporation, nor do they interfere with the transaction of a county's business required to be exclusively performed by a county court, nor do they involve a going into debt by counties as prohibited by the Constitution or authorize the expenditure of public money for another purpose than that for which it was collected, nor conflict with either the letter or spirit or the intent and purpose of section 22 of article 10 of the Constitution of this State."

Honorable William M. Quinn

Therefore, we find that in the above case the Missouri Supreme Court held that a law which required the county court to turn over to a special road district all of the money collected from that district, under a levy based upon Section 10482 RSMo 1909, as amended by the Laws of 1913, which section is substantially the same as our present Section 137.555, was constitutional.

In the 1923 case of Little Prairie Special Road District vs. Pemiscot County, 249 S.W., 599, and in the 1924 case of State v. Barry County, 258 S.W. 710, the Missouri Supreme Court, while not passing specifically upon the constitutionality of this law, assumed its constitutionality, in view of all which we believe it to be constitutional.

CONCLUSION

It is the opinion of this department that a law which requires that a portion of the money produced by the levying of a tax under authority of the first sentence of Section 12(a), of Article X, of the Constitution of Missouri 1945, be paid over to a special road district in proportion to the amount of money produced within such special road district, is constitutional.

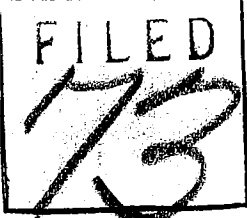
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

DEPARTMENT OF PUBLIC
HEALTH AND WELFARE:
DIVISION OF MENTAL DISEASES:
TRANSPORTATION CHARGES OF
STATE PATIENTS:

Counties of residence of state
patients at Missouri State
School are not liable for
transportation costs incurred
in treatment.



July 30, 1954

Mr. B. E. Ragland, Director
Division of Mental Diseases
Department of Public Health
and Welfare
Jefferson City, Missouri

Attention: W. K. Prior, Business Manager

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"Please advise if the County is responsible
for transportation charges and expenses in-
curred when a County Patient from a State
Institution is transferred to a Charitable
or Private Hospital for care and treatment,
as they would be under Section 202.340
R.S. Mo. 1953.

"In the particular case of Buelah Pulliam,
on which you made a decision for Marion
County which appeared in the newspaper on
May 12, 1954, please advise if Marion County
is responsible for transportation and hos-
pital charges for her and her offspring.
This county has refused to pay."

We are further advised by B. E. Ragland, Director, Division
of Mental Diseases, that your request relates to mentally defec-
tive children who have been committed to the Missouri State School
under the provisions of Sections 202.590 to 202.660, inclusive,
RSMo 1949. We are further advised that the particular transporta-
tion charges and expenses to which you refer arise by reason of
sending children so committed to charitable or private hospitals
for specialized care and treatment.

We have examined the statutes relating to the Missouri State
School and find that under Section 202.630 RSMo 1949, liability

Mr. B. E. Ragland, Director

has been imposed upon the counties of residence of state patients for expenses incurred in transporting such patients back to the county from whence admitted upon recovery. We also find that under the same statute similar liability has been imposed upon such counties for transportation charges and expenses incurred in the transfer of any of such patients who become dangerously insane to the nearest State Hospital to the county of residence of such state patient. These are the only statutes which relate to the payment of transportation of patients subsequent to their reception at the Missouri State School.

In the absence of any further statutes imposing liability upon the county of residence for transportation charges and expenses incident to the removal of state patients from the Missouri State School to charitable or private hospitals for specialized treatment, we do not believe that such counties are liable therefor.

We believe what has been said heretofore also answers your inquiry with respect to the particular case of Buelah Pulliam. For your further information, a copy of the official opinion relating to this subject, which was delivered under date of May 10, 1954, to Honorable Harry J. Mitchell, Prosecuting Attorney of Marion County, Missouri, is herewith enclosed.

CONCLUSION

In the premises, we are of the opinion that transportation charges and expenses incident to the transfer of state patients from the Missouri State School to charitable or private hospitals for specialized treatment and care, are not a liability of the county of residence of such state patients.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

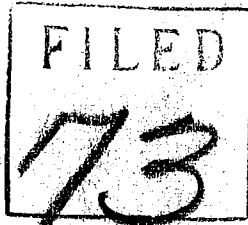
John M. Dalton
Attorney General

WFB/vtl

Enclosure: 5-10-54 to Harry J. Mitchell

PERSONNEL:
MERIT SYSTEM:
STATE HOSPITAL:
SUPERINTENDENT OF STATE HOSPITAL:
STATE EMPLOYEES:
EMPLOYEES:

Superintendent of state hospital
may accept other employment if
such employment does not conflict
with his position as superintendent.



November 29, 1954

Mr. B. E. Ragland, Director
Division of Mental Diseases
State Office Building
Jefferson City, Missouri

Dear Mr. Ragland:

This will acknowledge receipt of your letter of November 8, 1954, requesting an opinion of this office on the following question:

"Can a person employed as Superintendent of a State Hospital, as provided by the rules and regulations of the State Merit System, accept employment by the University of Missouri during his tenure of office as Superintendent?"

It is assumed from this request that the contemplated employment of the superintendent by the University of Missouri would be in the nature of part-time employment and that during such part-time employment, the superintendent could continue to perform the duties of and act as superintendent of his state hospital.

The basic principles upon which this problem should be determined have been expressed by the Supreme Court of Missouri en banc in the case of State ex rel McGaughey v. Grayston, 163 SW2d 335, 1.c. 339, 349 Mo. 700, where the court expressed as its view that the common law was well settled that public officials were by the common law prohibited from holding more than one office at the same time only when such offices were incompatible, that is, where the duties of the various offices were inconsistent, antagonistic, repugnant, or conflicting. In this connection the court said:

"The settled rule of the common law prohibiting a public officer from holding two

Mr. B. E. Ragland, Director

incompatible offices at the same time has never been questioned. The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other."

This doctrine has been followed likewise by the St. Louis Court of Appeals in the more recent case of Bruce v. City of St. Louis, 217 SW2d 744, where the court said:

"The limitation at common law upon the holding of two or more offices at one and the same time extends no farther than to prohibit the holding of incompatible offices. Any further inhibition must be constitutional or legislative. 42 Am.Jur., Public Officers, sec. 59."

As is pointed out by these cases, the common law only prohibits an official holding more than one position in the state where such positions are incompatible. Any further prohibitions against such dual employment must be by specific provision of either the constitution or statutes. A search of the Constitution of Missouri and the Missouri statutes has failed to reveal any prohibition against such dual employment as you mention in your request. However, it should be noted that Rule 6.4 (c) of the rules and regulations of the Personnel Advisory Board of the State of Missouri provides as follows:

"(c) Conflicting Employment. No employee shall have conflicting employment while in a position subject to the provisions of the Law. Determination of such conflict shall be made by the Director and the appointing authority."

Under this regulation, the same as under the general common law rule against one person holding two incompatible offices, the question resolves itself into one of fact as to whether or not

Mr. B. E. Ragland, Director

the duties of the two offices will conflict or interfere with each other. As you will note, the regulation quoted above provides that this determination of fact as to any conflict is to be made "by the Director and the appointing authority."

CONCLUSION

Therefore, it is the conclusion of this office that there is no legal prohibition against a superintendent of a state hospital accepting employment by the University of Missouri during his tenure of office as superintendent if the two employments are not incompatible and do not conflict, and the factual determination of whether or not there is such incompatibility or conflict is to be made by the appointing authority and the Director of the Personnel Advisory Board where the employee comes under the state merit system plan.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Very truly yours,

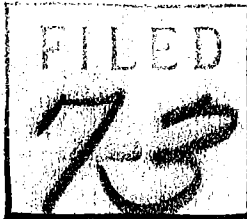
John M. Dalton
Attorney General

FLH:sm

ADMINISTRATIVE LAW: Barber Board does not have power to

BARBERS: prescribe rule limiting period of time

RULES AND REGULATIONS: within which the eighteen-month apprenticeship must be spent.



December 6, 1954

Mr. Charles F. Quinlin
Secretary, State Board of
Barber Examiners
906 Olive Street
St. Louis, Missouri

Dear Mr. Quinlin:

This is in response to your request for an opinion dated November 24, 1954, which reads as follows:

"It has been brought to the attention of the Barber Board that there is some dissatisfaction with the current status of the law as pertains to apprentices in the barber profession. As provided in Subsection 3 in Section 328.080, R.S. Mo. 1949, a person desiring to practice barbering in the state is required to have either studied the trade for two years as a registered apprentice, or attended a six-month school and served an additional eighteen months as a registered apprentice before being authorized to receive a certificate of registration authorizing him to practice the trade in this state.

"Certain barbers in the state are accepting apprentices under this provision of the law, only to have them quit after a period of a few months during the eighteen-month training period; after a period of several months or even several years these one-time apprentices will return and pick up where they left off on their apprentice period, thereby being authorized to take the examination and to receive their certificate of registration upon the completion of the stipulated period as provided for in the

Mr. Charles F. Quinlin

statutes, however long a period of time elapses between the start of their training and their examination for a barbers certificate.

"It has always been the interpretation of the Barber Board that we are not justified under the present status of the law in requiring that this apprenticeship be served continuously or within a stipulated period. As previously stated, there has been some agitation among some of the barbers to require that a time limit be set during which this training can be completed.

"Would you please advise the Board of your opinion as to whether or not a time limit such as this would be justified by the action of the Board, or is it your opinion that this is a matter of which the Legislature would have to take cognizance.

"A resolution was adopted at the last convention of the State Journeymen Barbers to require that, as stated above, a time limit be set within which an apprentice must complete his training for his license, making an exception only in the case of a man serving in the Armed Forces.

"Your opinion as to the above would be appreciated."

The State Board of Barber Examiners is an administrative body and as such is limited in its rule making powers. It is said in 42 Am. Jur., Section 53, page 358:

"The scope and extent of the power of administrative authorities to enact rules and regulations is limited by the Federal and state Constitutions and the statutes granting them such power. In many cases the power to make rules and regulations on a particular subject is a limited power, having respect to mode and form and time and circumstance, and not to substance. But in other cases the power is much more extensive and substantial and may be understood to give plenary control over those

Mr. Charles F. Quinlin

subjects. The rule of construction as to the extent of the power granted depends, at least in some sort, upon the nature of the subject matter. The extent of the power must be determined by the purpose of the act and the difficulties its execution might encounter. Since the power to make regulations is administrative in nature, legislation may not be enacted under the guise of its exercise by issuing a 'regulation' which is out of harmony with, or which alters, extends, or limits, the statute being administered, or which is inconsistent with the expression of the lawmakers' intent in other statutes. The administrative officer's power must be exercised within the framework of the provisions bestowing regulatory powers on him and the policy of the statute which he administers. He cannot initiate policy in the true sense, but must fundamentally pursue a policy predetermined by the same power from which he derives his authority.
* * *

Sutherland's Statutory Construction, Section 6603, says:

"Administrative agencies are purely creatures of legislation without inherent or common-law powers. The general rule applied to statutes granting powers to administrative boards, agencies or tribunals is that only those powers are granted which are expressly or by necessary implication conferred, and the effect usually has to accomplish a rather strict interpretation against the exercise of the power claimed by the administrative body. The rule has been variously phrased, including language to the effect that a power must be 'plainly' expressed; that a power is not to be 'inferred' or taken by 'implication'; or that the jurisdiction of an administrative agency is not to be 'presumed.'"

See also State ex rel. Springfield Warehouse and Transfer Co. et al. v. Public Service Commission, 240 Mo. App. 1147, 225 S.W. (2d) 792, 794.

Mr. Charles F. Quinlin

The power to require an apprentice to serve the eighteen-month apprenticeship period prescribed in Section 328.080, RSMo 1949, Cum. Sup., 1953, within a specified time limit is a legislative power. It is said in 42 Am. Jur., Section 36, page 329:

"Legislative power is the power to make, alter, or repeal laws or rules for the future. To make a rule of conduct applicable to an individual who but for such action would be free from it is to legislate. * * * Administration has to do with the carrying of laws into effect, their practical application to current affairs by way of management and oversight including investigation, regulation, and control, in accordance with and in execution of the principles prescribed by the lawmaker."

The Board of Barber Examiners has power to make rules concerning sanitation subject to the approval of the Division of Health of the State Department of Public Health and Welfare, but, inasmuch as we find no statute granting the Board the authority to make a rule requiring the eighteen-month apprenticeship to be served within a limited period of time, we must conclude that the making of such rule is beyond the power of the Board.

CONCLUSION

It is the opinion of this office that the State Board of Barber Examiners does not have the power to prescribe a rule limiting the period of time within which the eighteen-month training period, provided for in Section 328.080, RSMo 1949, Cum. Sup., 1953, must be spent.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

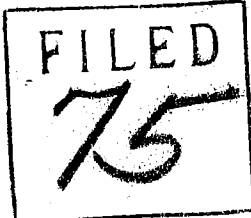
Very truly yours,

JOHN M. DALTON
Attorney General

JWI:ml

LICENSE: The ten dollar fee required for the issuance of a permit to engage in the pharmacy business by Section
PHARMACY: 338.220 RSMo, Cumulative Supp. 1953, is not a tax
TAXATION: and must be paid by a purely charitable organization engaging in the pharmacy business.

May 12, 1954



Honorable Charles W. Riley, Secretary
State Board of Pharmacy
245 Wilhoit Building
Springfield, Missouri

Dear Sir:

By letter dated April 27, 1954, you requested an official opinion as follows:

"We have encountered some difficulty in collecting the annual \$10.00 permit fee from the Barnes Hospital Pharmacy. As you know, this fee is required of all pharmacies according to Section 338.220, R. S. Mo., 1949.

"Barnes Hospital contends that it does not have to pay the annual \$10.00 permit fee for the reason that it is a non-profit institution and therefore not subject to the tax. It does not pay the annual tax to the City of St. Louis and feels that this is sufficient justification for refusal to pay the permit fee to the State of Missouri. It should be noted, however, that Sales Tax is paid on sales from the pharmacy.

"For your information, the Board has in effect and on file with the Secretary of State the following Regulation:

"Regulation 13. Hospital pharmacies, physician-owned clinic-pharmacies, and chemist shops shall come under the act as drug stores."

"We would appreciate your opinion as to this hospital is subject to the annual permit fee as prescribed by the statute."

Honorable Charles W. Riley

Section 338.220 RSMo, Cumulative Supp. 1953, requires the payment of a fee of \$10.00 for the issuance of a permit to operate a pharmacy within the state. Said Section reads as follows:

"1. On and after sixty days from and after the taking effect of sections 338.210 to 338.300, it shall be unlawful for any person, copartnership, association or corporation to open, establish, operate or maintain any pharmacy, as defined by statute, within the state of Missouri, without first obtaining a permit to do so from the Missouri board of pharmacy.

"2. Application for such permit shall be made upon a form to be prescribed and furnished by said board; such application shall be accompanied by a fee of ten dollars. The permit issued shall be for one year only, but may be renewable annually upon payment of a like fee. Separate applications shall be made and separate permits required for each pharmacy opened, established, operated or maintained by the same owner.

"3. All permits or renewal fees collected under the provisions of sections 338.210 to 338.300 shall be deposited in the state treasury to the credit of the Missouri board of pharmacy fund, to be used by the Missouri board of pharmacy in the enforcement of the provisions of sections 338.210 to 338.300, when appropriated for that purpose by the general assembly."

"Pharmacy" is defined by Section 338.210 RSMo Cumulative Supp. 1953, as follows:

"As used in sections 338.210 to 338.300 'pharmacy' shall mean any pharmacy, drug, chemical store, or apothecary shop, conducted for the purpose of compounding, and dispensing or retailing of any drug, medicine, chemical or poison when used in the compounding of a physician's prescription."

Honorable Charles W. Riley

The Constitution of Missouri, 1945, by Article X, Section 6, gives the Legislature authority to exempt from taxation certain types of property. That Section reads as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

By authority of said Article X, Section 6, the Legislature enacted Section 137.100 RSMo 1949, which reads as follows:

"The following subjects shall be exempt from taxation for state, county or local purposes:

"(1) Lands and other property belonging to this state;

"(2) Lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornament;

"(3) Lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease;

"(4) Nonprofit cemeteries;

"(5) The real estate and tangible personal property which is used exclusively for agricultural or horticultural societies heretofore organized, or which may be hereafter organized in this state;

Honorable Charles W. Riley

"(6) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational or charitable purposes. (L. 1945 p. 1799 Sec. 5)"

We assume that Barnes Hospital denies their liability for the license fee on the ground that said pharmacy is used "for purposes purely charitable, and not held for private or corporate profit."

Assuming for the purpose of this opinion only that said property is used only for purely charitable purposes and not for private and corporate profit, we conclude that the Barnes Hospital is liable for the payment of the fee mentioned in Section 338.220, if said hospital is engaged in the "pharmacy" business as defined by Section 338.210 supra. This conclusion is based upon the holding of the Supreme Court of Missouri in State vs. Parker Distilling Company, 236 Mo. 219, 139 S.W. 453, wherein the defendant objected to the payment of a fee for a license to engage in the manufacture and sale of intoxicating liquor. The Court made a distinction between the assessment of a license fee and taxation saying (l.c. 258, 259):

"The authorities clearly show what the difference is between taxation and the licensing of a business or occupation; and that there is no necessary connection between the two. 'A business may be taxed and yet not licensed, or it may be licensed and yet not taxed.' (Youngblood v. Sexton, 32 Mich. l.c. 425, (Cooley)).

"This difference is stated by Mr. Black in his work on Intoxicating Liquors, section 108, in the following language: 'If the business is under no legal condemnation, but is open to all persons to engage in, then the imposition

Honorable Charles W. Riley

of a tax upon it cannot be regarded as a license, because, by universal consent, a license is defined as a permit to do some or engage in some occupation which, without such permission, would be unlawful. A license law, therefore, assumes the illegality of the business, and denounces penalties upon those who pursue it without previously protecting themselves by procuring a license.'

"And in the same section he defines taxation as follows: 'Taxation, on the other hand, assumes the legality of the business for any one who may choose to pursue it, but imposes a burden for the public benefit upon those engaging in it. The case is not altered by the fact that payment of the tax is made a condition precedent to the right to engage in the business.'

"It should also be observed in this connection that the Act of 1909 does not purport to impose a direct tax upon the property mentioned therein. The most that counsel contend for, in that regard, is that the act imposes an indirect tax upon the property of respondent, by requiring it to pay the fees upon all sales mentioned in section 5 of the act.

"Having thus determined that the burden imposed by said section five is that of a license fee, required to be paid for the privilege of conducting business of respondent and not a tax upon its property, we will return to the original proposition presented: *****"

It being illegal to operate a pharmacy without being properly licensed, as it was illegal in the Parker case to manufacture and sell liquor without license, the fee required by Section 338.220 must be declared not to be a tax. Section 137.100 supra exempts property used for purely charitable purposes from taxation, and not from the payment of license fees. There being no other applicable exemption statute, we must conclude upon the facts assumed in this opinion that Barnes Hospital should be required to pay the ten dollar fee required by Section 338.220.

Honorable Charles W. Riley

CONCLUSION

It is, therefore, the opinion of this office that the ten dollar fee required for the issuance of a permit to engage in the pharmacy business by Section 338.220 RSMo, Cumulative Supp. 1953, is not a tax and, therefore, upon the facts presented in your letter, must be paid by Barnes Hospital.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

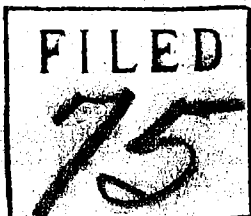
Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:lvd

CONSTITUTION: Section 338.260 RSMo, Cumulative Supp., 1953,
BOARD OF PHARMACY: can be enforced.
CRIMINAL LAW:

May 24, 1954



Honorable Charles W. Riley, Secretary
State Board of Pharmacy
245 Wilhoit Building
Springfield, Missouri

Dear Sir:

By letter dated April 27, 1954, you requested an official opinion as follows:

"It has been suggested to us that the above section, (Section 338.260, RSMo, Cumulative Supp., 1953), is unconstitutional and is not capable of enforcement. We would appreciate your opinion as to whether this section can be enforced or not." (Matter in parenthesis added.)

Section 338.260 RSMo, Cumulative Supp., 1953, reads as follows:

"No person shall carry on, conduct or transact a retail business under a name which contains as part thereof the words 'pharmacist', 'pharmacy', 'apothecary', 'apothecary shop', 'chemist shop', 'drug store', 'druggist', 'drugs', or any word of similar or like import, unless the place of business is supervised by a registered pharmacist."

Section 338.310 RSMo, Cumulative Supp., 1953, makes it a misdemeanor to unlawfully use the words prescribed by Section 338.260. Said Section reads as follows:

"Every person who violates any provision of sections 338.210 to 338.300 shall, upon conviction thereof, be adjudged guilty of a misdemeanor."

Honorable Charles W. Riley

The Legislature has declared that certain terms be not used in the name of a retail business unless that business is supervised by a registered pharmacist. The Legislature has further provided that any person so doing shall be deemed guilty of a misdemeanor. The Legislature has defined what constitutes a crime and made provision for punishment thereof. Therefore, Section 338.260 can be enforced.

There is a strong presumption that every legislative enactment is constitutional. That presumption is stated by the Supreme Court of Missouri in Hickey vs. Board of Education, 256 S.W. (2) 775, 1.c. 778 as follows:

"* * * 'It is a fundamental principle of constitutional law that a State Constitution is not a grant of power as is the Constitution of the United States but, as to legislative power, it is only a limitation; and, therefore, except for the limitations imposed thereby, the power of the State Legislature is unlimited and practically absolute.' Kansas City v. Fishman, 362 Mo. 352, 241 S.W. 2d 377, 379(1,2). Those limitations must be 'expressed in the Constitution or clearly implied by its provisions.' State v. Shelby, 333 Mo. 1036, 64 S.W.2d 269, 271(2). A statute will not be held unconstitutional unless it clearly and undoubtedly contravenes some constitutional provision. State ex rel. Hughes v. Southwestern Bell Telephone Co., 352 Mo. 715, 179 S.W.2d 77, 80(3-5). * * *"

The courts do not look with favor upon a ministerial officer questioning the constitutionality of a statute concerning their official duties. The Supreme Court of Missouri in State ex rel Chicago, R.I. & P. Railway Company vs. Becker, 41 S.W. (2) 188 quoted with approval the following, 1.c. 191:

"'To allow mere ministerial officers, who have no direct personal interest in the matter, to refuse to perform an act clearly pointed out, and made their official duty, by a statute, on the ground that the performance of the act would

Honorable Charles W. Riley

violate the constitution, would be establishing a very dangerous precedent, and one not warranted by the authorities. It would be deciding a constitutional question, affecting the right of third parties, at the instance of officers whose duties are merely ministerial, and who have no direct interest in the question, and cannot, in any event, be made responsible.' *Thoreson v. State Board of Examiners*, 19 Utah, loc. cit. 31, 57 P. 175, 178."

We suggest, therefore, that your Board should rely upon the strong presumption of constitutionality of the statutes in question, and should leave to persons adversely affected by the enforcement of said statutes the raising of the question of the constitutionality of such statutes.

CONCLUSION

In the premises, therefore, it is the opinion of this office that Section 338.260 RSMo, Cumulative Supp., 1953, can be enforced.

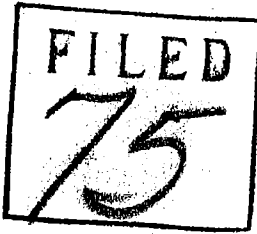
This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:lvd

CIRCUIT JUDGES: A circuit judge may accept an appointment as arbitrator between private interests, and he may accept compensation therefor, so long as the acceptance of such position does not interfere with the proper discharge of his duties as circuit judge.



December 29, 1954

Honorable Henry A. Riederer
Judge of the Circuit Court
Division No. 1
Kansas City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Attached please find copy of letter dated November 24, 1954, in which the writer is asked to serve on an Arbitration Board constituted pursuant to a private Collective Bargaining Agreement between the two parties mentioned therein.

"I should like to be able to answer officially the inquiry contained therein as to whether I am in a position to accept this appointment. Therefore, your opinion thereon is requested. This request is further predicated upon the assumption that the time required for the performance of these arbitration duties will not interfere with the regular duties performed by the court.

"I have examined the Canons of Judicial Ethics issued by the Executive Secretary of the Judicial Conference of Missouri dated October 4, 1954, and find nothing therein contrary to the assumption of such additional employment. However, I respectfully call your attention to the provisions of Section 478.013 contained in the Missouri Revised Statutes Cumulative Supplement for 1953, and particularly to the last sentence thereof, which reads as follows:

Honorable Henry A. Riederer

'No circuit judge shall practice law or do a law business nor shall he accept, during his term of office, any public appointment or employment for which he receives compensation for his services.'

"I do not believe this sentence has been construed and would like your opinion as to whether or not the proposed service on my part would constitute 'a public appointment or employment' within the meaning of this section.

"I should also like to be advised whether or not there is any other section of the law which would make the acceptance of such proposed employment improper or illegal."

You do not so state, but we feel justified in concluding from the general tone of your letter that you would receive compensation for serving on this arbitration board, apart from and in addition to your salary as circuit judge.

Let us first examine that portion of Section 478.013 of the Missouri Revised Statutes, Cum. Supp. 1953, quoted by you above. We note that it contains two prohibitions as to circuit judges. The first is that a circuit judge "shall not practice law or do a law business." We do not believe that serving as a member of an arbitration board could be construed as practicing law or doing a law business. It is well known that membership on such boards is by no means confined to lawyers, nor are the issues presented to such boards exclusively, even predominantly, legal. No doubt legal training and knowledge would enhance the qualifications of a person to sit upon such a board, but we do not believe that such sitting could be construed as practicing law or doing a law business.

The second prohibition of Section 478.013, supra, is that no circuit judge shall accept any public appointment or employment for which he receives compensation for his services. Service on the arbitration board would no doubt be by "appointment," but would such service constitute a "public appointment or employment"? In this regard we desire to discuss two matters pertinent to this issue. One of these is the obvious fact that a person could only receive a public appointment or public employment from a public officer or a public body of some sort.

Honorable Henry A. Riederer

There are many cases which define a "public officer." We here note a few of these cases and their holdings.

In 111 P. (2d) 824, the court held that a "public officer" is one whose duties are fixed by law, and who in the discharge of the same knows no guide, but established laws.

In the case of Sowers v. Wells, 95 P. (2d) 281, the court held that a "public officer" is an officer whose functions and duties concern the public, involving the idea of tenure, duration, fees, or emoluments and powers, as well as duty, all of which taken together constitute an office.

In the case of Martin v. Smith, 1 N.W. (2d) 163, the court held that a person employed cannot be a "public officer" unless there is devolved upon him by law the exercise of some proof of the sovereign power of the state in the exercise of which the public has a concern.

In the case of Spivey v. State, 104 P. (2d) 263, the court held that an individual invested with some portion of the sovereign powers of the government to be exercised by him for the benefit of the public, is a public officer.

In the case of McKinley v. Clarke County, 293 N.W. 449, the court held that to constitute one a public officer, his duties must either be prescribed by the constitution or the statutes, or necessarily inhere in, and pertain to, the administration of the office itself, and must embrace the exercise of public powers or trusts.

In the case of Whitney v. Rural Independent School Dist. No. 4, 4 N.W. (2d) 394, the court held that in determining whether one is a "public officer," the office itself must be created by the constitution of the state or authorized by statute.

We could quote numerous cases of the same purport, but the ones which we have noted above clearly indicate the general law upon this subject, in our estimation.

In the light of the above cases, we do not believe that it can be said that either the Kansas City Power and Light Company or Local Union 412, is a "public officer" or "a public body," or that a person appointed or employed by them was accepting a "public appointment or employment," because the appointing bodies were not themselves "public."

Honorable Henry A. Riederer

In the second place, looking at this matter from a slightly different angle, we do not believe that the position of arbitrator in a controversy between the Kansas City Power and Light Company and Local Union 412 is a "public appointment or employment," because it is private rather than public. On this point we note the following cases which represent the general law:

In the case of *People v. Powell*, 274 N.W. 372, the court held that "private" means affecting or belonging to individuals, as distinct from the public generally, and "public" means the whole body politic or all the citizens of the state, the inhabitants of a particular place.

In the case of *State v. Whitesides*, 9 S.E. 661, the court stated that the term "public" is opposed to the term "private," and means pertaining to or belonging to the people, relating to the nation or state, or community.

In the case of *Ex Parte Horn*, 292 Fed. 455, the court held that "public" is the whole body politic or all the citizens of the state.

Here also we could quote numerous cases of the same purport, but we do not feel that it is necessary to do so. In the light of the cases quoted, we believe, as we stated above, that the position of arbitrator under the conditions stated by you would not constitute a "public appointment or employment." It is therefore our conclusion that the portion of Section 478.013, supra, quoted by you, would not prevent you from accepting the position of arbitrator which has been offered to you. Neither do we find any other law or laws which would serve as prohibitive. We are, of course, accepting as fact, in reaching the above conclusion, your statement that your acceptance of this position will not interfere with the regular duties of your office of circuit judge.

We do not believe that the matter of incompatibility enters into this situation. In this regard we direct attention to the case of *People ex rel. Bagshaw v. Thompson*, 130 P. (2d) 237, 1.c. 241. In its opinion in that case the court states:

" * * * The right to perform duties does not exist until there is at least tenure or term of office; that is, the right to perform the duties incidental thereto; tenure of office refers generally to the right to hold office subject to its termination by some contingency

Honorable Henry A. Riederer

such as age limitation, resignation, death, removal, etc. 'Tenure' is sometimes held to be synonymous with 'term of office' (Hunt v. Superior Court, 178 Cal. 470, 173 P. 1097), which ordinarily refers to a fixed period. 62 Corpus Juris, 714. Until tenure in the sense of term of office exists, there can be no incompatibility of official duty for the simple reason that there is no "right * * * and duty * * * invested (by law) * * * to perform a public function for public benefit." People ex rel Chapman v. Rapsey, supra."

CONCLUSION

It is the opinion of this department that a circuit judge may accept an appointment as arbitrator between private interests, and that he may accept compensation therefor, so long as the acceptance of such position does not interfere with the proper discharge of his duties as circuit judge.

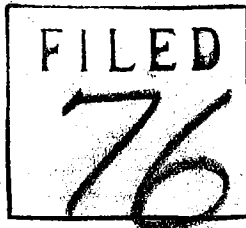
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW:ldjml

ELECTIONS: Withdrawal of candidate who has filed declaration
of candidacy need not be acknowledged to be
BALLOTS: effective. Valid withdrawal cannot subsequently
be withdrawn. Such person's name should not
COUNTY CLERKS: appear on ballot.



July 28, 1954

Honorable Lawson Romjue
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Mr. Romjue:

This is in response to your request for opinion dated
July 22, 1954, which reads, in part, as follows:

"The County Clerk of Macon County has
directed me to request your opinion as
to the action, under the law of our
State, which he should take in the fol-
lowing factual situation.

"Prior to the closing date for filing
for offices in April an individual (who
for the sake of clarity I will hereafter
refer to as candidate) filed himself for
precinct committeeman. On July 12 a
written statement or declaration in
appropriate language to indicate the in-
tention of the candidate to withdraw his
name from the ballot as a candidate for
precinct committeeman was delivered to
the County Clerk by a third person. On
July 20 the County Clerk received a
letter from the candidate through the
mail dated July 19 and requesting that
his name be placed on the ballot for
precinct committeeman. Both of these
documents were signed but neither of
them was acknowledged or sworn to.
Another man has also filed in proper
time for committeeman in that precinct.

Honorable Lawson Romjue

"Question: Should the County Clerk order the ballots for the particular precinct to be printed so as to include the name of the person I have referred to as candidate on the ballot?"

On June 10, 1948, this office rendered an opinion to Honorable James Glenn, Prosecuting Attorney of Macon County, a copy of which we enclose, which opinion held that "Where a person has duly filed for public office and within the proper time files a withdrawal of that candidacy, said person cannot subsequently file a withdrawal of the withdrawal."

We believe the conclusion of the above opinion is sound law, which leaves for our determination the sole question of the validity or effectiveness of the instant candidate's withdrawal. If his withdrawal was effective, his name should not appear on the ballot, but if ineffective, he has not in fact withdrawn, and both his attempted withdrawal and revocation of his withdrawal should be ignored.

In determining the validity of his withdrawal, the basic question is whether it was necessary that the withdrawal be acknowledged. If Section 120.230, MoRS, Cum. Supp. 1953, passed by the General Assembly in 1953 as part of Senate Bill No. 117, is applicable to those who file declarations of candidacy for the primary election, acknowledgment is necessary; otherwise it is not required.

On June 18, 1954, this office rendered an opinion to Honorable Robert A. Dempster, Prosecuting Attorney of Scott County, in which Section 120.230, supra, was applied generally to all candidates for election in determining the time within which candidates might withdraw their candidacy. Since that date the Supreme Court of Missouri decided the case of State ex rel. Preisler v. Toberman, No. 44,409, April 1954 Session, handed down on July 12, 1954, and because of the holding and reasoning of that case we hereby withdraw the Dempster opinion above mentioned.

The Preisler case held that Senate Bill No. 117, 67th General Assembly, Sections 120.140 - 120.230, MoRS, Cum. Supp. 1953, by implication repealed and replaced the certificate of nomination method provided by Sections 120.010 and 120.080, RSMo 1949, but that "the 1953 Act does not refer to the State

Honorable Lawson Romjue

primary election in any way except to state the conditions under which a new political party shall be entitled to take part in." In other words, except as above limited, the court held that Senate Bill No. 117 had reference only to nominating petitions.

In discussing the various sections of this act the court said: "Section 120.230 provides a method and time for withdrawal by a candidate nominated by petition."

We believe, and so rule, that Section 120.230 applies only to those candidates who have been nominated by the petition method, and not to those who have become candidates by filing a declaration of candidacy for the primary election.

There is no other statute specifying the time or the method of withdrawal for a candidate who has filed a declaration of candidacy, therefore the Legislature has not required that such a withdrawal be acknowledged. It is significant to note also that the Legislature has not required that the declaration of candidacy itself be acknowledged, and we cannot presume that any greater formality is required in withdrawing such candidacy. In the absence of such requirement, we hold that the written statement received by the county clerk on July 12, signed by the candidate and in language sufficient to indicate the candidate's intention to withdraw his name from the ballot, was an effective and valid withdrawal which could not subsequently be revoked. Therefore, the county clerk should order the ballots printed excluding this person's name therefrom.

CONCLUSION

It is the opinion of this office that a person who has duly filed a declaration of candidacy and later and in due time submits to the county clerk a written, signed statement indicating his intention to withdraw his name from the ballot as a candidate, has effectively withdrawn as a candidate. Such withdrawal need not be acknowledged and any subsequent attempt to withdraw his withdrawal is ineffective. Under the above circumstances, the county clerk should order the ballots printed excluding this person's name therefrom.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

Enc: Opn. James Glenn,
6-10-48.

INSURANCE: Foreign insurance companies operating in Missouri under Missouri's stipulated premium plan law, Sections 377.200 to 377.460, RSMo 1949, are not subject to Missouri's corporation franchise tax levied under Section 147.010, RSMo 1949. Missouri corporations organized and operating under said stipulated premium plan law are subject to said franchise tax unless they accept the provisions of Missouri's regular life insurance company law found at Sections 376.010 to 376.670, RSMo 1949.



August 30, 1954

Honorable James M. Robertson
Chairman, Missouri State Tax Commission
Room 501, Jefferson Building
Jefferson City, Missouri

Dear Sir:

The following opinion is rendered in reply to your request reading as follows:

"Kindly furnish this Commission with your official opinion to whether domestic or foreign insurance companies, operating under the provisions of Sections 377.200 to 377.460, R. S. Mo. 1949, both inclusive, are subject to corporation franchise taxes in Missouri."

Missouri's general corporation franchise tax statute, Section 147.010 RSMo 1949, provides that domestic and foreign corporations doing business in Missouri are to pay an annual franchise tax admeasured according to the formula outlined in such statute. The exception found in the statute reads, in part, as follows:

"Provided, that this law shall not apply to corporations not organized for profit, nor to express companies, which now pay an annual tax on their gross receipts in this state, and insurance companies, which pay an annual tax on their premium receipts in this state; * * *."

Honorable James M. Robertson

The language found in the above-quoted exception clause of Section 147.010, RSMo 1949, leads to the conclusion that if the type of insurance company referred to in the opinion request is bound by statute particularly applicable to it, to pay an annual tax on its premium receipts in Missouri, it will be exempted from the franchise tax being discussed. In the case of State ex rel. Central Surety Insurance Company v. Tax Commission, 153 S.W. (2d) 43, 348 Mo. 171, the Supreme Court of Missouri spoke as follows at 348 Mo., l.c. 174, on construing this franchise tax statute:

"The only statute that levies a franchise tax is Section 5113, and it expressly exempts such a tax on insurance companies that pay a tax upon gross premium receipts."

Are insurance companies formed under the specific provisions of Sections 377.200 to 377.460, RSMo 1949, the law particularly applicable to insurance companies formed on the stipulated premium plan, obligated to pay a tax upon their gross premium receipts? Section 377.430, RSMo 1949, sets forth the requirements to be met by a foreign corporation, company, association or society doing business in Missouri, as authorized by Sections 377.200 to 377.460, RSMo 1949, and reads, in part, as follows:

"Neither shall any foreign corporation, company, association or society be authorized to do business in this state under sections 377.200 to 377.460, unless it collects in advance for the benefit of its policyholders a net premium equal to at least that provided for by the terms of sections 377.200 to 377.460; provided, that all such foreign corporations shall annually pay a tax on the gross premiums received in this state on account of business done in the state at the rate of one per cent per annum, which shall be in lieu of all other taxes as herein otherwise provided; said tax shall be levied and collected as is provided for in the collection of taxes on other insurance companies."

The language heretofore quoted from Section 377.430, RSMo 1949, clearly brings foreign insurance companies operating in Missouri under the provisions of Section 377.200 to 377.460, RSMo 1949, within the exception clause found in Missouri's

Honorable James M. Robertson

corporation franchise tax statute, Section 147.010, RSMo 1949, heretofore quoted, and causes such foreign insurance companies to be exempt from the franchise tax. From a close examination of the stipulated premium insurance company law, found at Sections 377.200 to 377.460, RSMo 1949, it becomes evident that no statutory provisions therein make it mandatory for Missouri companies organized thereunder to pay a premium tax. Before passing from the stipulated premium plan insurance law, attention is directed to the following language found in Section 377.450, RSMo 1949:

"1. Any domestic life or accident insurance corporation, company or association existing or doing business in this state under the stipulated premium plan law, may, by a majority vote of its directors or trustees, accept the provisions of sections 376.010 to 376.670 RSMo 1949, and amend its articles of incorporation and its bylaws to conform to said chapter, the same as if it had originally been incorporated thereunder,
* * *."

The above reference is made at this particular point of this opinion for the reason that we now consider pertinent statutes found in the law particularly applicable to the subject of taxation of insurance companies, embraced in Sections 148.310 to 148.460, RSMo 1949. Section 148.310, RSMo 1949, subjects insurance companies to real property and tangible personal property tax. Section 148.320, RSMo 1949, subjects stock companies organized under the provisions of Section 379.010 to 379.190, RSMo 1949, to a premium tax. Section 148.340, RSMo 1949, is a general statute subjecting foreign insurance companies to a premium tax. Section 148.370, RSMo 1949, (L. 1945, p. 993) provides for a premium tax on (1) domestic regular life companies, (2) domestic mutual companies other than life and fire, (3) domestic title insurance companies, and (4) domestic miscellaneous mutual fire companies organized under Sections 379.010 to 379.190 RSMo 1949. Nowhere in the above-mentioned statutes do we find domestic stipulated premium companies subjected to a premium tax.

CONCLUSION

It is the opinion of this office that domestic stipulated premium insurance companies organized under the provisions of

Honorable James M. Robertson

Sections 377.200 to 377.460, RSMo 1949, are subject to Missouri's corporation franchise tax levied under Section 147.010, RSMo 1949, unless they have accepted the provisions of the regular life insurance company law under authority contained in Section 377.450, RSMo 1949; that foreign insurance companies operating in Missouri under Sections 377.200 to 377.460, RSMo 1949, being required by Section 377.430, RSMo 1949, to pay premium taxes, are exempt from Missouri's corporation franchise tax.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

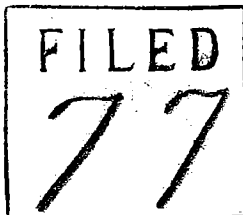
Yours very truly,

JOHN M. DALTON
Attorney General

JLO'M:vlw

SCHOOLS:
SCHOOL DISTRICTS:

The sale of a school building by the board of education of a reorganized school district without having advertised the same in accordance with Section 165.370, RSMo. 1949, is invalid.



February 19, 1954

Mr. Donald B. Russell
Prosecuting Attorney
Vernon County
Navada, Missouri

Dear Mr. Russell:

We render herewith our opinion based upon the following request received from you:

"I would like an opinion from your office as to the sale of school sites abandoned by a reorganized school district. One of the reorganized school districts of this county recently sold several school buildings and sites which were no longer needed by the new reorganized district. One of the buildings and sites, in particular, was sold privately with no notice or advertisement of any kind.

"The only statute which I find to be applicable is Section 165.370 of the Missouri Revised Statutes of 1949 which provides 'that whenever there is within a district a school property that is no longer required for the use of the district the board is authorized to advertise, sell and convey the same.' This seems to require an advertisement of a sale and it would seem to follow that a failure to advertise would make the sale by the board void."

The authority of a reorganized school district to sell the school building is based upon this portion of Section 165.687 RSMo. 1949:

"The directors above provided shall be governed by the laws applicable to six-director school districts."

Mr. Donald B. Russell

We turn, then, to the laws relating to six-director districts, and particularly Section 165.370 RSMo. 1949, the pertinent part of which reads as follows:

" * * * whenever there is within the district any school property that is no longer required for the use of the district, the board is hereby authorized to advertise, sell and convey the same, and the proceeds derived therefrom shall be placed to the credit of the building fund of such district."

It is a well-known principle that a school district must point to a specific statute to justify its every act. It has no authority beyond that given it by statute. In *State vs. Kessler, et al*, 117 S.W. 85 at 1.c. 86, the court said:

"The board of directors of the school district is a body clothed with authority to discharge such functions of a public nature as are expressly prescribed by statute. It can exercise no power not expressly conferred or fairly arising by necessary implication from those conferred."

And in *Wright vs. Board of Education*, 295 Mo. 466, 246 S.W. 43, 27 A.L.R. 1061, the court said at S.W. 1.c. 45:

"The power of the board to make the rule in this case is to be considered prior to a determination of its reasonableness. The power delegated by the Legislature is purely derivative. Under a well-recognized canon of construction, such powers, however remedial in their purpose, can only be exercised as are clearly comprehended within the words of the statute or that may be derived therefrom by necessary implication; regard always being had for the object to be attained."

Also see 47 Am. Jur., Schools, Section 42.

There is no question the board has the power to sell the school buildings, having determined that they are no longer required for the use of the district. The question is: What is the effect of its not having advertised the buildings before selling, as required by the above quoted Section 165.370 RSMo. 1949? Our answer is that it renders the sale invalid.

Mr. Donald B. Russell

In re Farmers & Merchants Bank of Chillicothe, 63 S.W.2d 829, the court said (S.W. l.c. 830):

"The school district did not have power to sell its property or authority to dispose of its public revenue save in the manner provided in chapter 57, R.S. Mo. 1929 (section 9194 et seq. (Mo. St. Ann. Sec. 9194 et. seq., p. 70661)). An examination of the applicable statutes discloses that the Legislature did not intend to invest the board of directors of a school district with authority to execute an instrument such as the one here involved."

This case indicates that Missouri recognizes the rule stated in 47 Am. Jur., Schools, Section 43:

"And school boards come within the general rule that where a power is given to do an act, and the particular method by which that power is to be exercised is pointed out by statute, the mode is the measure of the power."

For that proposition is cited Barton vs. School District, 77 Oregon 30, 150 P. 251, Ann. Cas. 1917(a) 252. Holding invalid a contract to hire a teacher, which contract had been signed by the directors individually and not in a meeting of the directors as required by statute, the court said at P. l.c. 252:

"It is a principle settled by numerous decisions that where a power is given to a corporation to do an act, and the particular method by which that power is to be exercised is pointed out by statute, the mode is the measure of the power. Here the power or duty to employ teachers is prescribed, and the particular method by which that power shall be executed is also pointed out, and not only is this the case, but the statute adds the mandatory words:

'Any duty imposed upon the board as a body must be performed at a regular or special meeting, and must be made a matter of record.'"

CONCLUSION

It is the opinion of this office that the sale of a school building by the board of education of a reorganized school district

Mr. Donald B. Russell

without having advertised the same in accordance with Section 165.370, RSMo. 1949, is invalid.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Don Kennedy.

Very truly yours,

John M. Dalton
Attorney General

WDK/vtl

AGRICULTURE:

COMMUNITY SALES LAW:

Application of the Missouri Community
Sales Law to stated transactions.

July 14, 1954



L. A. Rosner, DVM
State Veterinarian
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"* * * I would very much appreciate an opinion from your office as to whether or not the community sales law, Senate Bill No. 11, 1943, would apply to (1) the city of West Plains stockyards and scale facilities; (2) the various buyers who utilize the scale and rent holding facilities in the West Plains stockyards; (3) privately owned concentration points and facilities, the latter being the small yard loading and weighing facilities that some dealers in feeder pigs maintain; (4) to terminal markets which are not under federal or state supervision.

"By way of explanation I would like to mention that the West Plains stockyards are nothing more than the holding and weighing facility for swine purchased privately in most instances. It is a well known and long established meeting point for the consignor of feeder pigs and the prospective buyer. No commissions are charged except a weighing fee of 3 1/2¢ per head. It is probable that holding pens are rented for a specified period of time.

L. A. Rosner, DVM

Due to the lack of inspection and application of the same regulations as apply to swine handled through the community auction sales, we have had increasing difficulty in recent years with the pigs which are sold and handled through this sale."

The questions which have been presented will be discussed in order. You first inquire whether the community sales law applies to the "city of West Plains stockyards and scale facilities."

We understand the facts to be as follows: The city owns and maintains stockpens and scales for the weighing of livestock. The city charges a fee of so much per head for the use of the scales and probably rents the pen facilities for a specified time. We further understand from our conversation with you that the city does not conduct or manage the sales of livestock, but that such matters are handled privately by persons using the facilities above mentioned.

The community sales law to which you refer is found in Chapter 277, RSMo 1949. The term "community sales" is defined in Section 277.020, as follows:

"The term 'community sales' means any series of sales, exchanges or purchases of any livestock made at regular or irregular intervals at an established place in this state, by any person, directly or indirectly, for or on account of the producer or producers, consignor or consignors thereof, at public auction or at private sale, except that this term shall not apply to established markets operating under federal or state regulations, or to any public or private farm or purebred livestock sale."

Section 277.030 provides that: "No person * * * shall engage in the business of operating a community sale unless duly licensed, * * *." Said section reads as follows:

"No person as defined in this chapter shall engage in the business of operating a community sale unless duly licensed, as herein provided."

L. A. Rosner, DVM

It is noted that a person, as defined in this chapter, is prohibited from engaging in the business of operating a community sale unless licensed and that a community sale is defined in part in Section 277.020, supra, to be the sale, exchange or purchase of livestock by a person directly or indirectly for or on account of the producer or producers, consignor or consignors thereof.

Assuming the facts as above stated to be true, and upon which this opinion is based, it is our belief that the city is not engaged in the business of operating a community sale since the city does not buy, sell or exchange livestock; nor does it operate or conduct the sale. It merely leases pen facilities and furnishes, for a fee, scales for the weighing of livestock, and therefore Chapter 277 would not be applicable to such city.

You next inquire whether the various persons who lease the above-mentioned facilities would be subject to the provisions of Chapter 277. Again we must refer you to the definition of a community sale as above noted. Whether or not said person would fall within the above definition would depend upon the facts of each particular case and each case would have to be considered upon its own merits. However, we believe that it can be safely said that if such persons regularly use such facilities for the sale, purchase or exchange of livestock, whether directly or indirectly, regularly, or irregularly, and whether by public auction or by private sale, they would be subject to the provisions of Chapter 277, since it would be carried on at an established place in this State.

Thirdly, you inquire whether said law applies to privately owned concentration points and facilities which are small yard loading and weighing facilities used by dealers in feeder pigs. What has previously been stated in answer to questions number one and two would be applicable to question number three with the further note that the term "community sales" does not apply to public or private farm or purebred livestock sales.

Lastly, you inquire whether the community sales law applies to "terminal markets" which are not under federal or state supervision. We understand the term "terminal markets" to be used as referring to stockyards such as are located in Kansas City and St. Louis and this opinion is based upon such an understanding. Section 277.020 exempts from the operation of a community sales law "established markets operating under federal or state regulations." The stockyard facilities such as are maintained in St. Louis and Kansas City are, in fact, to some extent regulated

L. A. Rosner, DVM

by the state and federal governments. See Chapter 276, RSMo 1949 and U.S.C.A., Title 7, Sections 181 to 231. Since such markets do operate under state and federal regulations we are of the opinion that Chapter 277 does not apply thereto. Such an interpretation is in accord with the popular and accepted definition of the term "community sales" and it is doubtful that the Legislature ever intended to extend the provisions of the community sales law to such established markets.

CONCLUSION

It is, therefore, the opinion of this office that the community sales law does not apply to a city which maintains stock pens and scale facilities where the city does not actually operate or conduct sales at such place but merely rents or leases such facilities to others. If the persons who use said facilities are engaged in the business of conducting sales, exchanges or purchases of livestock, whether at regular or irregular intervals and ~~ir~~ regardless of whether it is by public auction or private sale, they would be subject to the provisions of the community sales law.

It is the further opinion of this office that the Missouri Community Sales Law does not apply to an established market such as the St. Louis and Kansas City Stockyards which are, to some extent, subject to state and federal regulations.

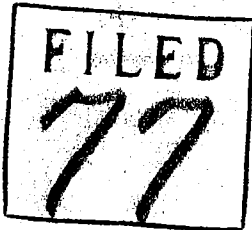
This opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/LVD/VTL

AGRICULTURE: If a person employed by a serum company
STATE VETERINARIAN: receives in fact compensation for the
VETERINARIAN: administration of anti-hog cholera serum--
virus and/or vaccines to swine, as dis-
tinguished from compensation for the sale
thereof, he would be practicing "veterinary medicine" and required
to procure a license under the provisions of Chapter 340, RSMo
Cumulative Supp., 1953.



July 21, 1954

L. A. Roemer, DVM
State Veterinarian
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion,
which request reads in part as follows:

"The question has been asked * * * as to whether or not the veterinary practice act as contained in Section 2, subsection 1 of Senate Bill 354 as passed by the 67th General Assembly would apply to those individuals employed by the company who are engaged in the administration of anti-hog cholera serum-virus and/or vaccines to swine. Presumably the livestock owner is charged only for the serum.

"It is quite possible that these men receive their remuneration in the form of a commission which would represent the difference between the wholesale and retail price of the product used. I should like your opinion on the basis of whether or not the law applied where the individual was working on a commission basis and where the individual was strictly in the employ of the company and received a specified salary only for his work in connection with the administering of the product."

Senate Bill 354 as enacted by the 67th General Assembly relating to the licensing of persons practicing veterinary medicine is found in Chapter 340, RSMo Cumulative Supp., 1953.

L. A. Rosner, DVM

Section 340.010 defines the term "veterinary medicine" in the following language:

* * * * *

"(3) 'Veterinary medicine,' the practice of alleviating, rectifying, curing or preventing any injury, disease, deformity or physical condition of animals other than human beings and shall include the diagnosing of any affliction, the dispensing or administration of any medicine, appliance, treatment or operation, or the advising, recommending or prescribing the administration or use of any medicine, appliance, treatment, course or program of treatment, or operation on any such animal."

Section 340.020 provides that it shall be unlawful for any person not licensed as a veterinarian to practice veterinary medicine for a valuable consideration. Said section provides in part as follows:

"It shall be unlawful for any person not licensed as a veterinarian under the provisions of this chapter to practice veterinary medicine or to do any act which requires knowledge of veterinary medicine for valuable consideration or for any person not so licensed to hold himself out to the public as a practitioner of veterinary medicine by advertisement, the use of any title or abbreviation with his name, or otherwise; except that nothing in this chapter shall be construed as prohibiting:

* * * * *

The foregoing noted provision contains certain exemptions which do not appear applicable to the question at hand and are, therefore, not set forth.

We believe that it is clear beyond doubt that the administration of anti-hog cholera serum-virus and/or vaccines to swine falls within the term practice of veterinary medicine as noted in Section 340.010. However, such acts by a person not licensed under the provisions of Chapter 340 are not prohibited unless such is done for valuable consideration. Section 340.020, supra.

L. A. Rosner, DVM

You first inquire whether the provisions of Chapter 340 would apply to a person who administers anti-hog cholera serum-virus and/or vaccines to swine and receives remuneration in the form of a commission which would represent the difference between the wholesale and retail price of the product used. It is our understanding that the sale of the product is negotiated by the person who administers the serum rather than by the serum company and if such is the case, other facts of a particular transaction would be necessary for a complete determination of the question. If, for example, a person sells serum and administers it for the retail price of the serum and also sells serum at the retail price without administering it, it would appear that his commission was obtained for the sale of the serum. However, if a person would sell and administer serum at a stated price and at the same time would sell the serum without the service of administration, at a lower price, it would appear that such person was receiving consideration for the administration of the serum. It is obvious then that the mode of operation of a particular person would have to be inquired into to determine if in fact such person was subject to the provisions of Chapter 340, RSMo Cumulative Supp., 1953.

Your next inquiry under the provisions of Chapter 340 would apply to a person employed by a serum company and who receives a specified salary for his work in connection with the administration of the product. If the remuneration is for the administration of anti-hog cholera serum-virus and/or vaccines, then it is our opinion that such person should procure a license to practice veterinary medicine since he is receiving valuable consideration for performing acts defined to be the practice of veterinary medicine.

CONCLUSION

Therefore, it is the opinion of this office that if a person employed by a serum company receives in fact compensation for the administration of anti-hog cholera serum-virus and/or vaccines to swine, as distinguished from compensation for the sale thereof, he would be practicing "veterinary medicine" and required to procure a license under the provisions of Chapter 340, RSMo Cumulative Supp., 1953.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

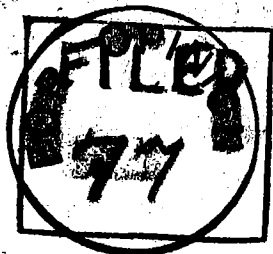
Yours very truly,

John M. Dalton
Attorney General

DDG/vtl

VETERINARIANS:
LICENSE:

An applicant for a nongraduate license under Section 340.040, Missouri Revised Statutes Cumulative Supplement, 1953, cannot be refused a license solely by reason of having been convicted.



October 13, 1954

Missouri Veterinary Board
P.O. Box 630
Jefferson City, Missouri

Attention: Dr. L. A. Rosner, Chairman

Gentlemen:

This will acknowledge receipt of your recent request for an opinion. Restating your request for sake of brevity, you inquire if a person may obtain a nongraduate license provided for under Section 340.040, Missouri Revised Statutes Cumulative Supplement 1953, if said person has been convicted prior to filing his application for said license.

Section 340.040, supra, reads:

"Any person who for each year during the past twenty years has made the greatest percentage of his income from the treatment of animals and who has resided in the same town or community during this time shall be issued a nongraduate license upon filing proof of these qualifications with the board. This license will allow the holder to continue the treatment of animals as long as he does not represent himself to the public as a practitioner of veterinary medicine by advertisement, the use of any title or abbreviation with his name or otherwise. Any person receiving a license under this section shall be subject to the other provisions of this chapter."

Nothing in the foregoing would disqualify any applicant from receiving a nongraduate license simply

Missouri Veterinary Board
Attention: Dr. L.A. Rosner:

because he may have been convicted. However, said statute concludes that any person receiving a license under said section shall be subject to the other provisions of said chapter. We construe that to mean merely that anyone licensed under Section 340.040, Missouri Revised Statutes Cumulative Supplement, 1953, must so conduct himself thereafter to conform to all other provisions and requirements in Chapter 340, Missouri Revised Statutes Cumulative Supplement, 1953, that do not in any manner conflict with the provisions of Section 340.040, supra. In other words the qualifications for obtaining a nongraduate license are found in Section 340.040, supra. Furthermore, said statute refers to persons receiving a license thereunder who shall be subject to other provisions of said chapter, that is, the other provisions of said chapter that only apply to one therefore licensed and not merely an applicant for a nongraduate license.

The only specific mention of a conviction found in Chapter 340, supra, is in Section 340.090, Missouri Revised Statutes Cumulative Supplement, 1953, which reads:

"1. The board may suspend or revoke the license of any person to practice veterinary medicine for any of the following causes:

"(1) * * * (2) * * * (3) * * *

"(4) For the conviction of any felony or crime involving moral turpitude, or for habitual drunkenness or the use of narcotics while in the performance of his duties; * * *."

Such restriction only relates to the power of said Missouri Veterinary Board to suspend or revoke a license already issued to a person to practice veterinary medicine, however the same provisions in said statute apply to one holding a nongraduate license.

Furthermore, there are several established rules of statutory construction, if applied to the instant request will clearly indicate that the legislative intent in enacting Chapter 340, supra, was not to include as one of the qualifications for obtaining a nongraduate license, that such applicant shall not have been convicted.

Missouri Veterinary Board
Attention: Dr. L. A. Rosner:

One well established rule of construction is that statutes that impose licenses are to be construed liberally against the individual and strictly against the state. State v. Hatfield, 73 Mo. App. 506; Section 392, page 937, Volume 82 Corpus Juris Secundum; Crawford on Statutory Construction, Section 357, page 735. Furthermore, it is well established that such boards or officers authorized to determine qualifications and issue or refuse licenses have no powers or duties other than those created by statute. Sections 32 and 437, Page 623 and page 646, respectively, Volume 53 Corpus Juris Secundum.

We are not unmindful of the rule that certain officers have implied authority to carry out that power expressly granted, however, such implied authority cannot go beyond that expressly granted in the statute.

We believe the legislative intent in enacting Chapter 340, Missouri Revised Statutes Cumulative Supplement, 1953, and especially Section 340.040 thereof, was that an applicant for a nongraduate license in order to obtain such a license need only to meet the requirements as contained in that particular statute.

CONCLUSION

Therefore, it is the opinion of this department that an applicant for a nongraduate license under Section 340.040, Missouri Revised Statutes Cumulative Supplement, 1953, cannot be refused a license solely by reason of having been convicted.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

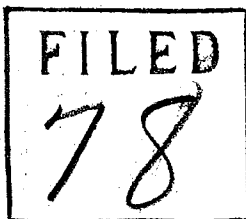
Yours very truly,

JOHN M. DALTON
Attorney General

ARH:vlw:irk

COUNTY COURT:
ASSESSOR:

County Court in counties of third class may not employ clerical and stenographic personnel for the office of assessor other than is provided in Section 53.095, V.A.M.S.



February 1, 1954

Honorable Earl Saunders
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Mr. Saunders:

Reference is made to your recent request for an official opinion of this office wherein the following question is asked:

"Has the County court the authority to hire a clerical or stenographic assistant, fix the compensation of said assistant and pay same out of the County Treasury, for the use of the assessor in addition to the provisions of Sec. 53.095, Mo. R.S. Cumulative Supplement, 1951."

Your attention is directed to Section 53.095, V.A.M.S. enacted by the 66th General Assembly which provides as follows:

"The county assessor in each county of classes three and four may appoint and fix the compensation of such clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office. The compensation of such clerical or stenographic assistants shall be paid from the county treasury and shall not exceed six hundred dollars per annum in counties of class three nor six hundred dollars per annum in counties of class four."

This section provides that the assessor may appoint such clerical and stenographic assistants as may be necessary for the efficient performance of the duties of the office, to be paid from

Honorable Earl Saunders

the county treasury in an amount not to exceed \$600. per annum. What then is the effect of this provision?

It is a familiar rule that the primary and fundamental factor in the construction of a statute is the ascertainment of the law-maker's intent, *Turner v. Kansas City*, 191 S.W. 2d. 612, and, further, that where the statute limits the doing of the thing in a prescribed manner it necessarily includes in the power granted the negative that it cannot be otherwise done. *Lancaster v. County of Atchison*, 180 W.W. 2d. 706. Keeping in mind these rules it is our opinion that Section 53.095 precludes the payment out of county funds of clerical or stenographic assistants working in the office of assessor.

The General Assembly in enacting this provision took into consideration the needs of the various assessors for clerical and stenographic assistants and authorized the official to contract for such hire and provided for their payment from county funds not to exceed a stated amount. The Legislature could have provided for other and additional clerical and stenographic assistants but did not and in so doing (under the rule above stated) placed an implied prohibition against such additional employment other than in the manner provided and in excess of the county funds specifically allowed therefor.

CONCLUSION

Therefore, it is the opinion of this office that the county court of a county of the third class has no authority to hire clerical or stenographic assistants for the assessor and pay said employees out of county revenue other than as provided by Section 53.095, V.A.M.S.

This opinion, which I hereby approve, was written by my assistant, Mr. Donal D. Guffey.

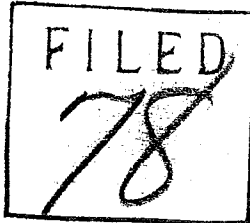
Yours very truly,

JOHN M. DALTON
Attorney General

COUNTY:

ROADS AND BRIDGES:

County court unauthorized to bring a civil action to determine if the road in question is a public road. Prosecuting Attorney, if satisfied that it is a public road, may bring suit to abate the obstruction across said road as a nuisance.



February 3, 1954

Honorable Earl Saunders
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion on the questions contained in the enclosed copy of a letter from the County Clerk of Jefferson County, addressed to you as Prosecuting Attorney of said County.

The following facts are contained in the Clerk's letter. In 1951, a petition was filed in the county court of Jefferson County, Missouri, requesting said court to declare and order a certain road to be a public road. Apparently, the county court took no action on said petition. Subsequent thereto, during the past years said road was closed by the construction of a fence across said road by a property owner over whose property said road is constructed. Said property owner claimed such right because of non-use and relocation of said road.

The Clerk specifically inquires: 1) if it is the duty of the county court to institute a civil action to determine whether or not a road in question is a public road, and, 2) is it the duty of persons signing a petition and filing same in the county court in 1951, requesting said court to declare said road a public road, to institute a civil action to determine whether or not the road in question is a public road.

The Clerk inquires in both instances if it is the duty of said persons to institute a civil action to determine whether said road is a public road. We find no statute making it the mandatory duty of any of such persons to bring any such action. However, we assume that you really are inquiring if they may do so under the law and if so, what is the nature of such action.

Honorable Earl Saunders

The latter request contained in the Clerk's letter relates to the right of certain individuals who had signed a petition, filed in the county court, to bring a civil suit to determine if the road in question is a public road. While we believe these petitioners do have a remedy at law, they are in no manner county or public officials and there is no official duty incumbent on you as county prosecuting attorney to furnish them legal advice, therefore we regret to advise you that as of necessity, we must confine this opinion to only the first request for an opinion which deals specifically with the authority of the county court.

Under Section 7, Article VI, Constitution of Missouri, 1945, it provides that there shall be elected a county court which shall manage all county business as prescribed by law and keep an accurate record of its proceedings. See also Sections 49.270, 49.310 to 49.510, RSMo 1949.

Therefore, the county court is vested with only such authority as may be granted by the legislature and necessary implied authority to carry out such expressed powers.

A careful examination of the statutes, constitution and decisions in this state fail to disclose wherein the county court is vested with any authority to bring such civil action to determine whether such road be a public road.

Therefore, it is the opinion of this department that said county court is not authorized to bring any such civil action to determine if the road in question is a public road.

Notwithstanding the foregoing, we are of the opinion that if you, as county prosecuting attorney, upon investigation shall determine that this is a public road, that such obstruction does inconvenience the travel in the county and is not authorized, that you may bring suit in the circuit court at the relation of the state to abate such obstruction.

It has been held that the construction of a fence across a public highway constitutes a nuisance which may be abated by action of the prosecuting attorney in behalf of the State of Missouri. In State v. Franklin, 133 Mo. App. 486, l.c. 493, the court said:

"Both on reason and authority, it is quite clear that the maintenance of the obstructions

Honorable Earl Saunders

in the public highway by the defendant Franklin and the neglect of the town to perform its duty to proceed for the abatement of the nuisance, justified the State in employing its visitorial power for the correction of the abuse."

Furthermore, in State ex rel. v. Vandalia, 119 Mo. App. 406, l. c. 418, the court said:

"The Attorney-General of the State, or the prosecuting attorney of the county in which the nuisance exists, may proceed in equity in behalf of the sovereignty of the State, for its abatement. This is the rule independent of any statute touching the matter, as has been adjudged in many cases. (Smith v. McDowell, 148 Ill. 51, 22 L. R. A. 393; State v. Dayton, 36 Ohio St. 434; Hunt v. Railroad, 20 Ill. App. 282; People v. Beaudry, 91 Cal. 213, 220)"

CONCLUSION

Therefore, it is the opinion of this department that the county court in this instance is unauthorized to bring any civil action to determine if the road in question is a public road. If the county prosecuting attorney determines that the road in question is a public road, then acting in his official capacity, he may bring a suit to abate the obstruction across said road as a nuisance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

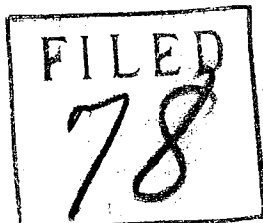
Very truly yours,

JOHN M. DALTON
Attorney General

ARH:sm

BARBERSHOPS:)
CLOSING WEEKDAY:)

The St. Joseph common council has no power to enact an ordinance prohibiting the opening of barbershops on a weekday (i.e., a day other than Sunday).



February 27, 1954

Hon. Wm. Orr Sawyers
Senator, 34th District
Donnell Court
St. Joseph, Missouri

Dear Sir:

We render herewith our opinion based upon your request of February 15, 1954, which request reads in part as follows:

"The St. Joseph Local Union of the barbers in this vicinity A.F. of L., would like a law regulating barber shops whereby barber shops would be prohibited from opening for business on Mondays or some other week day. Of course there is already a law which prohibits them from opening for business on Sunday. * * *

"The St. Joseph barbers feel that they are entitled to such a law, which in a sense would legalize a five-day week in the operation of barber shops. * * *

"My question is this: Would it be legally possible under the Missouri Constitution and Statutes for the common council of the City of St. Joseph to pass an ordinance prohibiting barber shops from remaining open on Mondays or any week day? I have searched diligently and have not found such authority, but I can be mistaken, and I need your opinion in the matter. * * *"

We conclude that it is not within the power of the common council of the City of St. Joseph to enact an ordinance prohibiting barber shops from remaining open on Monday or another week day. Our reasoning follows:

Hon. Wm. Orr Sawyers

It is a well-known principle of law that a municipality has and can exercise only such powers as are conferred by express or implied provisions of law, their charters being a grant and not a limitation of power, subject to strictest construction with doubtful powers resolved against the city. *The City of Springfield v. Clouse*, 206 S.W. (2d) 539, 356 Mo. 1239. St. Joseph is a city of the first class.

Let us look then at the statutes concerning a city of the first class for a grant of authority for such an ordinance as that proposed.

Section 71.750, RSMo 1949, cited in your letter, reads thus:

"The Legislative bodies for all incorporated cities * * * are hereby empowered to pass * * * ordinances to regulate the hours of closing of barbershops. * * *"

This provision, we believe, does not give the necessary authority. It contemplates that the barbershop will open on the business day, and gives authority only to prescribe the hour of closing.

If the municipality has such power, it must be found in Subsection XVII of Section 73.110, RSMo 1949, granting the mayor and common council the power "to license, tax and regulate * * * barber shops * * *"; or in Subsection LVI thereof, which reads, in part, as follows:

"The mayor and common council of cities of the first class are hereby empowered and authorized to pass all needful ordinances for preserving order, securing property and persons from violence, danger or destruction, protecting public and private property, and for promoting the general interest and insuring the good government of such city; * * *."

We take the "general interest" used in the last above quoted to be synonymous with the "general welfare", and to confer upon the city the usual police power to enact ordinances to promote the health, morals, and general well-being of the community.

We believe, however, that the police power of the city will not permit it to enact the proposed ordinance.

Hon. Wm. Orr Sawyers

In pursuance of such power, it has been held that it is within the city's police power to prohibit the sale of bakery products by bakers and bakershop keepers after 9:00 A.M. on Sunday. The theory was not that Sunday was a special day which the city council could require to be kept holy, but that one day of rest and quiet during the week was conducive to the health and welfare of the community. *Komen v. City of St. Louis*, 289 SW 838, 316 Mo. 9. Indeed, such ordinances and statutes have generally been held valid, and on the same theory. See *Anno. 20 A.L.R., 1114*, Constitutionality of statute regulating barbers.

The argument can be made that the legislative authority may find that two days of rest would be more conducive to the public health, and that this would justify such an ordinance. But we think that does not follow.

Since time immemorial, it has been considered that man's health and well-being required that he spend one day in seven in rest and relaxation. In all Christendom the first day of the week is observed as that day -- by both Christians and non-Christians -- except by those who observe instead the seventh day. There is, therefore, sound reasons for according the first day of the week special legislative treatment.

But it is not widely held that two days respite from labor is required for man's health. We think that the relationship between man's health (which is a valid concern of the police power) and the proposed ordinance is too remote to authorize the enactment. In *State ex rel. Newman v. Laramie*, 40 Wyo. 74, 275 P. 106, the Court struck down a municipal ordinance regulating opening and closing hours of barbershops, saying:

" * * * And while the courts repeatedly have said they should not decide as to the expediency of a measure, it has come to be settled by the high court whose decisions establish the rules limiting the exercise of police power that a court should and does determine whether, in its judgment, the law has a real or substantial relation to objects and purposes recognized as legitimate The claim that the restriction in the law bears a reasonable relation to a public interest must not rest on mere conjecture, but must be supported by something of substance Unless the closing regulation in question in the

Hon. Wm. Orr Sawyers

case at bar bears a real and substantial relation to the purpose of protecting the public from the spread of disease, it stands on the same footing as any similar restriction on the right of a citizen to engage in a harmless and useful occupation."

We think that reasoning is applicable here.

We could go further. If the council could decree that barbershops be closed on a given day other than Sunday, why not two days? Or three? We think it was not the legislative intention to invest it with that power.

CONCLUSION

It is the opinion of this office that the St. Joseph common council has no power to enact an ordinance prohibiting the opening of barberhsops on a weekday (i.e., a day other than Sunday).

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Don Kennedy.

Yours very truly

JOHN M. DALTON
ATTORNEY GENERAL

JMD:A

COUNTY HEALTH CENTER:

Salary of dentists employed at county health center for treatment of indigent persons to be paid out of funds of such health center.



May 7, 1954

Honorable Earl Saunders
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department based upon a letter received by you from the Presiding Judge of the Jefferson County Court reading as follows:

"The enclosed proposal of the Jefferson County Health Center has been submitted to the County Court for consideration.

"Our question is: Can the County Court legally participate in this program as outlined in paragraph 7?

"Dr. Rice has suggested that this would not properly be a function of the Health Center in as much as it involves actual medical treatment rather than preventative work.

"The Health Center is providing all the necessary equipment to put the plan into operation (including dentists' chairs, X-ray, etc.) and has ordered equipment

Honorable Earl Saunders

in the amount of approximately \$1700.

"In addition, the Health Center will provide all supplies and materials used in the treatment. (Paragraph 6)

"Will you please let the County Court have an opinion on this matter?"

The "proposal" referred to in the letter of inquiry reads as follows:

"PROPOSED PLAN FOR PROVIDING DENTAL SERVICES TO NEEDY CHILDREN

"1. This plan, as described, is advanced by the dentists of Jefferson County as a means of providing some of the dental care that is greatly indicated among needy children who are residents of the county.

"Briefly, the proposal is that at the beginning, at least, the dental service will operate one day a week and will be for children twelve years of age or under who are residents of this county and whose parents or guardians have been screened by the Welfare Department as financially unable to provide the care out of their own resources.

"The dentist who will serve in the Health Center will be a dentist who is already in practice in the county.

"2. WHO WILL BE SERVED---Only children twelve years or under. This is the period of life when most constructive dental results may be obtained. It is also the period of life when a child can be most easily influenced concerning his future interest in his own dental needs. If some limitation from an age standpoint is not enforced, our efforts would be so scattered that little impression on dental needs could be made. All children served will be screened by the Welfare.

Honorable Earl Saunders

"3. TYPE OF DENTAL CARE TO BE GIVEN---

- (1) Silver and silicate fillings,
- (2) Extractions where necessary, (3) Gum treatments, (4) Space maintainers, (5) Oral prophylaxis.

"4. REFERRALS---Teachers who observe a dental need in the indicated age group may refer cases through the Welfare Agency. School nurses may do the same. Public Health Nurses will also have this privilege. Clearance by Welfare may be an office procedure because the family is already known, otherwise parents or guardians of the child must visit the Welfare Agency for interview. The responsibility for getting the child to the Health Center should be left with the child's family except in unusual situations. The person referring the child to the Welfare should make inquiries as to feasibility of the family following through on this responsibility without help.

"5. PERSONNEL---(1) One dentist employed the equivalent of one day a week. (2) One assistant for the dentist employed in the same manner.

"6. RECORDS-EQUIPMENT-OFFICE SPACE-SUPPLIES
---These will all be supplied by the Jefferson County Health Department; estimated cost is \$600.00 annually.

"7. PAY OF DENTIST AND DENTAL ASSISTANT---
As the work outlined is of the nature of medical care, it seems necessary that the pay of the dentist and the dental assistant be provided from sources other than the revenue derived from the Health Unit tax. It is estimated that the annual cost for the dentist and dental assistant, on this basis, will amount to \$2000.00 annually."

Honorable Earl Saunders

From the "proposal" submitted it is apparent that the purpose of the agreement is to provide limited dental care for children of indigent parents at a cost of \$2,000.00 per annum. Your inquiry submits the question of the source from which such sum is to be paid.

It first becomes pertinent to determine whether such dental services may be rendered in connection with the operation of a county health center. We direct your attention to the provisions of Section 205.050, RSMo 1949, reading as follows:

"The public health center is established, maintained and operated for the improvement of health of all inhabitants of said county or counties."

Certain limitations exist with respect to the use of county health centers which are embodied in Section 205.060, RSMo Cumulative Supplement, 1953, reading as follows:

"The board of county health center trustees shall not enter into contracts for the private practice of medicine, nor shall any of its personnel practice medicine nor dispense drugs, vaccines or serums for personal gain, nor shall its facilities be used for such purpose in any way except as it may be necessary and agreed upon between the board and county court or courts for the care of the indigent for whom the court or courts may be responsible, or except in furtherance of diagnostic and communicable disease control programs." (Emphasis ours.)

The limitations expressed disclose that it is properly within the purview of the activities of a county health center to render medical service provided such services are not rendered for personal gain and further provided, that such services are rendered under an agreement between the county health center and a county court for the care of the indigent for whom the court may be responsible.

Honorable Earl Saunders

Adverting to the "proposal" attached to your letter of inquiry we note that only children of indigent parents will be permitted to receive the dental services described in the agreement. Being in this financial classification such children therefore are proper subjects for the expenditure of county funds for their medical treatment.

It next becomes important to determine the source from which the proposed \$2,000.00 shall be paid. We direct your attention to Section 205.042, RSMo Cumulative Supplement, 1953, reading, in part, as follows:

"4. The board of health center trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the county health center as may be deemed expedient for the economic and equitable conduct thereof. They shall have the exclusive control of the expenditures of all moneys collected to the credit of the county health center fund, and of the purchase of site or sites, the purchase or construction of any county health center buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose. All moneys received for the county health center shall be deposited in the county treasury to the credit of the county health center fund, and paid out only upon warrants ordered drawn by the county court upon properly authenticated vouchers of the board of health center trustees.

"5. The board of health center trustees may appoint and remove such personnel as may be necessary and fix their compensation; and shall in general carry out the spirit and intent of this chapter pertaining to establishing and maintaining a county health center. * * *

It seems to us that this provision with respect to the payment of the salaries of personnel of the county health center is exclusive.

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CONCLUSION

In the premises we are of the opinion that the salaries of dentists employed by a county health center for the purpose of rendering dental care to the children of indigent parents pursuant to an agreement with respect thereto with the county court are to be paid from the funds of such county health center.

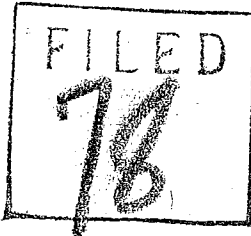
The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB:vlw

CORPORATIONS: A person (and his barmaids) selling intoxicating
CRIMINAL LAW: liquor other than malt liquor, such person hold-
LIQUOR CONTROL: ing only a malt liquor license, should be charged
with violation of Section 311.270 RSMo 1949,
rather than 311.550 RSMo 1949. The malt liquor
license of a corporation will not be automatically
revoked under the provisions of Section 311.720
RSMo 1949, unless said corporation shall have
been convicted of violating the provisions of
Chapter 311, RSMo 1949. Service of process in
a criminal action against a corporation is by
a summons, said summons to be served in the manner
provided for service on a corporation in a civil
action.



June 8, 1954

Honorable Earl Saunders
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Attention Mr. Irvin D. Emerson

Dear Sir:

By recent letter your office requested an official
opinion as follows:

"* * *The facts again briefly are that the
agents of the Department of Liquor Con-
trol inspected Quonsett Inn, Inc., a holder
of a malt liquor license only, and found
them serving whiskey highballs and consider-
able quantity of whiskey, scotch whiskey
and wine upon the premises. This corpora-
tion previously had its 3.2 beer license
revoked.

"Question 1. Can the corporation be tried
under the criminal provisions of chapter
311 Revised Statutes, 1949., and if so
what section?

"Question 2. Can the officers of the
corporation be tried under the criminal
provisions of chapter 311, R.S. Mo., 1949?
If so what section?

Honorable Earl Saunders

"Question 3. How can service be obtained in a criminal suit against a corporation?

"Question 4. Will a conviction against the officers of the corporation forfeit the license of the corporation? If not what will be necessary to forfeit the license of the corporation?

"Question 5. Is there any section other than 311.550 under which the barmaids could be charged with a misdemeanor for the sale of liquor? If so what section."

Your questions No. 1 and No. 2 as to the criminal liability of a corporation and its officers are answered by a previous opinion of this office rendered to Honorable Walker Pierce, Supervisor, Department of Liquor Control on July 24, 1939, and an opinion rendered to Honorable Joseph L. Gutting, Prosecuting Attorney of Clark County, on March 23, 1937. Copies of these opinions are enclosed.

In answer to your question No. 3 as to service on a corporation, you are referred to Supreme Court Rule 21.10, which reads as follows:

"If a corporation is charged with the commission of a criminal offense in any complaint, information or indictment, a summons shall be issued thereon which shall recite the substance of the offense charged and shall command the corporation to appear at a time and place stated therein. Such summons shall be served in the manner provided for service on a corporation in a civil action."

Provision for service of process in civil cases is made by Section 506.150 RSMo 1949 which reads as follows:

"The summons and petition shall be served together. Service shall be made as follows:

* * * * *

"(3) Upon a domestic or foreign corporation or upon a partnership, or other unincorporated

Honorable Earl Saunders

association, when by law it may be sued as such, by delivering a copy of the summons and of the petition to an officer, partner, a managing or general agent, or by leaving the copies at any business office of the defendant with the person having charge thereof, or to any other agent authorized by appointment or required by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

* * *

Section 311.720 provides for automatic revocation of the license of a person convicted of violation of Chapter 311. Said Section reads as follows:

"Conviction in any court of any violation of this chapter shall have the effect of automatically revoking the license of the person convicted, and such revocation shall continue operative, until said case is finally disposed of, and if the defendant is finally acquitted, he may apply for and receive a license hereunder, upon paying the regular license charge therefor, in the same manner as though he had never had a license hereunder; provided, however, that the provisions of this section shall not apply to violations of section 311.070, and violations of said section shall be punished only as therein provided."

It must be noted that the above Section provides for automatic revocation only upon conviction of a person. The word "person" as used in Chapter 311 includes corporation according to Section 311.030, RSMo 1949.

"The term 'person' as used in this chapter shall mean and include any individual, association, joint stock company, syndicate,

Honorable Earl Saunders

copartnership, corporation, receiver, trustee, conservator, or other officer appointed by any state or federal court."

If the corporation itself is not convicted, automatic revocation of its license will not ensue. If the corporation is convicted of violating the provisions of Chapter 311, its license will be automatically revoked.

In your question No. 5 you inquire whether there is any Section other than Section 311.550 under which the barmaids could be charged with the illegal sale of liquor. You stated in your letter that the corporation in question is the holder of a license for the sale of malt liquor. Section 311.270 makes it a misdemeanor for a person holding only a malt liquor license to sell any intoxicating liquor other than malt liquor. That Section in part reads as follows:

"1. It shall be unlawful for any person, holding a license for the sale of malt liquor only, to possess, consume, store, sell, or offer for sale, give away or otherwise dispose of, upon or about the premises mentioned in said license, or, upon or about said premises, to suffer or permit any person to possess, consume, store, sell or offer for sale, give away or otherwise dispose of, any intoxicating liquor of any kind whatsoever other than malt liquor brewed or manufactured by the method, in the manner, and of the ingredients, required by the laws of this state. Whosoever shall violate any provision of this section shall be guilty of a misdemeanor, and upon conviction thereof by any court of competent jurisdiction shall be punished as in this chapter provided as to misdemeanors. Upon such conviction becoming final, the license of the person so convicted shall forthwith, and without other or further action, order or proceeding, be deemed to have been revoked, and shall by the licensee be forthwith surrendered to the supervisor and canceled."

* * * *

Honorable Earl Saunders

Section 311.550 makes it a felony to sell intoxicating liquor without a license authorizing the sale thereof.

That Section reads in part as follows:

* * *

"7. Any person who shall sell in this state any intoxicating liquor without first having procured a license from the supervisor of liquor control authorizing him to sell such intoxicating liquor shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the penitentiary for a term of not less than two years nor more than five years, or by imprisonment in the county jail, for a term of not less than three months nor more than one year, or by a fine of not less than one hundred dollars nor more than one thousand dollars, or by both such fine and imprisonment."

To determine under what Section you should proceed in a criminal action against the parties here involved, it is necessary to consider the parts of Section 311.270 and Section 311.550 noted above. It is a fundamental rule of statutory construction that all statutes applicable to a given subject must be read and considered together and, if possible, harmonized. *State v. Naylor*, 328 Mo. 395, 40 S.W.2d 1079. It is another fundamental rule of construction of criminal statutes that they be construed liberally in favor of the defendant, and strictly against the State. *State v. Bartley*, 304 Mo. 58, 263 S.W. 95. Therefore, in considering the two statutes together and construing them strictly in favor of the defendant, we conclude that the Legislature considers the offense of selling intoxicating liquor on a malt liquor license to be less heinous than the sale of intoxicating liquor by a person who has no type of license to sell any kind of intoxicating liquor.

Therefore, we conclude that a person selling intoxicating liquor other than malt liquor, holding only a malt liquor license, should be charged under the provision of Section 311.270. An employee of a person holding a malt liquor license is entitled to the protection of that license to the same extent as an employer, while said employee is engaged in selling liquor there-

Honorable Earl Saunders

under. The St. Louis Court of Appeals in State v. Barnett, 111 Mo.App. 688, 1.c. 691, made this statement on that subject:

"* *It is conceded that appellant sold the liquor as charged on May 3rd, 1903, and that May 3rd was Sunday. It is also conceded that appellant had no license himself as a dramshop keeper but that he was acting when the sale of liquor was made as the agent, servant or bartender of his employer, Ira Barnett, who was a licensed dramshop keeper.

"There can be no doubt that if the evidence had shown the sale of liquor to have been made on Saturday, May 2nd or Monday, May 4th, together with a showing that appellant was acting for his principal, and that such principal was a licensed dramshop keeper, this would have made a complete defense to this prosecution for selling without a license.* *"

CONCLUSION

It is, therefore, the opinion of this office that a person (and his barmaids) selling intoxicating liquor other than malt liquor, such person holding a malt liquor license only, should be charged with violation of Section 311.270 RSMo 1949, rather than 311.550 RSMo 1949. It is further the opinion of this office that the malt liquor license of a corporation will not be automatically revoked under the provisions of Section 311.720, RSMo 1949, unless said corporation shall have been convicted of violating the provisions of Chapter 311, RSMo 1949. Service of process in a criminal action against a corporation is by a summons, said summons to be served in the manner provided for service on a corporation in a civil action.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

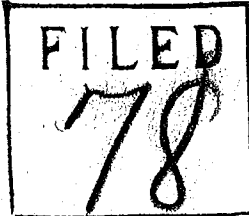
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Enclosures 7-24-39 to Walker Pierce
3-23-37 to Joseph Gutting

Replied
PUBLIC HEALTH AND WELFARE;
WOMEN:
TAXATION:
EQUITABLE CONVERSION:

The names of the owners of real estate, if known, should be placed in the real estate book, and that vendees under a contract of sale of real property may be the owners to be listed in the real estate book if the provisions of the contract are such as to invoke the doctrine of equitable conversion.

June 17, 1954



Honorable Earl Saunders
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

By letter of April 8, 1954, you requested an official opinion on two questions. Your first question reads as follows:

"A situation has developed in this County with regard to the number of hours that a manufacturing establishment may permit a female employee to work in one day or in one week.

"May I respectfully direct your attention to the provision of Section 290.040, R. S. Mo. 1949 and Section 290.050 relating to the hours of labor of female employees?

"In the assumed fact situation stated below, would an employer be in violation of Section 290.040 making it unlawful to employ a female in a manufacturing establishment for more than nine hours in any one day.

"Jane Doe is scheduled to work the 3:30 P.M. to Midnight shift Monday through Friday. After working her regular shift on Wednesday, she elected, or is assigned, to fill a job opening on a shift beginning at 7:00 A. M. Thursday and ending at 3:30 P. M. the same day.

"In other words, the question involves a determination of whether the day contemplated in the above Act is a calendar day, commencing at Midnight

Honorable Earl Saunders

and ending 24 hours later, or whether it is any twenty-four (24) hours period commencing with the start of the employee's work-shift."

That question is answered by a previous opinion of this office rendered to Hon. Orville S. Traylor, Commissioner, Labor and Industrial Inspection Department, on July 13, 1944. That opinion is enclosed.

Your second question reads as follows:

"On April 14, 1947 _____ of De Soto, Missouri filed a plat of the _____ Subdivision, containing thirty-four lots in the office of the Recorder of Deeds of Jefferson County and said plat was recorded as of said date.

"Later, _____ caused to be built several houses in said subdivision, and as grantor, sold these houses and executed only a deed of contract to the grantees.

"The grantees have recorded their deeds of contract and have requested that the real estate described on the several deeds of contract be placed on the Jefferson County Real Estate Tax Book.

"The _____ Subdivision was laid out on 37.50 acres owned by _____, and said acreage is on the 1953 real estate tax book of Jefferson County for a valuation of \$550; but because _____ is now in Europe, the taxes on this \$550 valuation for 1953 are delinquent and the parties holding deeds of contract executed by _____ feel that their interest is in jeopardy.

"In view of the fact that _____ has not executed a warranty deed to the grantees, the County Court and the Assessor would like a clarification on the following query:

"Can the County Court or the Assessor place on the real estate tax book of Jefferson County

Honorable Earl Saunders

a parcel of real property sold on a deed of contract plan where no warranty deed has been executed delivered and recorded by the grantor and grantee?"

Persons owning real property are made liable for taxes thereon by Section 137.075, RSMo 1949.

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

The Assessor is required to be furnished a "real estate book", which book shall contain the name of the owner or owners of real estate. This is required by Section 137.225, RSMo 1949, part of which is quoted below:

"1. In all counties, except the city of St. Louis, the assessor shall be provided with two books, one to be called the 'real estate book,' and the other to be called the 'personal assessment book.'"

"2. The real estate book shall contain all lands subject to assessment. It shall be in tabular form, with suitable captions and separate columns. The first column shall contain the name of the owner or owners, if known;
* * * * *

Under the doctrine of equitable conversion, the vendees under the contracts of sale may be considered the owners thereof. This doctrine is stated in 18 C.J.S. CONVERSION, Page 48, 49 as follows:

"A contract for the sale of land ordinarily works a conversion, equity treating the vendor as holding the land in trust for the purchaser, and the purchaser as a trustee of the purchase price for the vendor. The vendor's interest thereafter in equity is in the unpaid purchase price, and is treated as personalty, while the purchaser's interest is in the land and is treated as realty. Such conversion becomes absolute if the terms of the contract of sale are subsequently complied with. If there is

Honorable Earl Saunders

no default in that respect, but the purchaser performs all the conditions precedent, which, under the contract, would entitle him to a conveyance, he will be deemed at the time of such performance to be the owner of the land and the vendor to be the owner of the purchase money.

"The general rule, however, that conversion results from the making of a contract for the sale of realty does not obtain under all circumstances, and, where something more than mere payment of money remains to be done before completion of the contract for sale, there is no conversion.

"Condition precedent. Provisions in a contract for the sale of real estate, making performance on the part of the purchaser of his contract to pay a portion of the purchase money and to secure the balance by mortgage on the premises a condition precedent to a conveyance by the vendor, do not take the case out of the general rule."

We have not been informed of the provisions of the contracts of sale in question. Therefore, we cannot state whether equitable title has passed to the vendees. You should consider those contracts in the light of the above rule and determine whether equitable title has passed to the vendees. If it has, their names should be placed on the real estate book as the owners of the land in question.

CONCLUSION

It is, therefore, the opinion of this office that the names of the owners of real estate, if known, should be placed in the real estate book, and that vendees under a contract of sale of real property may be the owners to be listed in the real estate book if the provisions of the contract are such as to invoke the doctrine of equitable conversion.

Honorable Earl Saunders

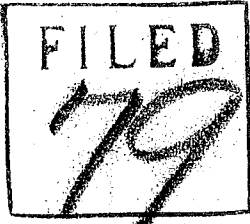
This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON
Attorney General

PMcG:lvd

Enclosure 7-13-44 to Orville S. Traylor



MAGISTRATE COURT: (Opportunity and time to consult with
MISDEMEANORS:) friend or attorney must be given in
(Magistrate Court to person charged with
(misdemeanor at time of arraignment.
(Defendant may waive such right if con-
(tinuance granted for such purpose and
(defendant cannot make bail should be
) committed to jail.

July 28, 1954

Hon. J. B. Schnapp
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Schnapp:

We render herewith our opinion based upon your request of June 21, 1954, which request reads as follows:

"The Honorable E. C. Westhouse, Magistrate Judge of this County, has requested that I secure an opinion from you on the following question, to-wit:

"Many persons, who have been arrested on a warrant issued by the Magistrate Court or who have been given a 'courtesy' summons by the State Highway Patrol to appear before the Magistrate Court and answer to a misdemeanor charge, do not wish to have 'an opportunity and reasonable time to talk with a friend and attorney' (R. S. Mo., 1949, sec. 558.380) after they have been arraigned, but on the contrary desire to enter a plea of 'Guilty' immediately after the charge (information) is read to them (R. S. Mo., 1949, sec 543.180 and Supreme Court rule 22.07).

"Does the phrase 'an opportunity and reasonable time to talk with a friend and an attorney' mean and does it apply (1) from the time the charge is read to the defendant in court, if the defendant appears voluntarily on a 'courtesy' summons, and (2) from the time the defendant saw and understood the charge on the warrant of arrest?"

Hon. J. B. Schnapp

"Can the defendant either voluntarily or involuntarily waive this right if he is fully advised of it?"

"If the Magistrate Court determines that a plea of 'Guilty' cannot be accepted because neither time nor opportunity had been given, then on a resetting of the case to a later date for a plea would the court issue a 'Warrant of Commitment Pending Plea' or should the defendant be recommitted on the original warrant?"

Our opinion is based upon Section 558.380 RSMo 1949, which reads as follows:

"Any judge, magistrate or police judge who shall accept of a plea of guilty from any person charged with the violation of any statute or ordinance at any place other than at the place provided by law for holding court by said judge, magistrate or police judge, or who shall accept of any plea of guilty without first giving the person charged with an offense an opportunity and reasonable time to talk with a friend and an attorney, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding three months, or by both such fine and imprisonment, and in addition, shall forfeit his office."

Your first question is whether an opportunity and reasonable time to consult with a friend or attorney must be given to a defendant who has seen and understood the charge against him from the warrant of arrest. Or, in other words, at his arraignment on the charge, must he, even though he has previously been advised of the charge and has had an opportunity to consult with

Hon. J. B. Schnapp

friend or counsel, be accorded an opportunity and reasonable time to consult with friend or counsel.

We believe that Section 558.380 supra, contemplates that the opportunity and time (if the latter is required) be given at the time of arraignment.

We think it unnecessary to give a defendant in a criminal case in the Magistrate Court time to consult a friend or attorney, when he states that he does not want such time. It is necessary for the judge, under Section 558.380, quoted above, to give the defendant an "opportunity" to do so; and, should he avail himself of such opportunity, to allow him a "reasonable time" for such purpose, before accepting his plea of guilty. But, having given him the opportunity, and he not availing himself of it, the judge is not required to give him time he does not want.

In State v. Rogers, Mo. Sup., 285 S.W. 976, the facts were as follows:

"The information was filed November 2, 1925, and on that day appellants were arraigned and each entered his plea of guilty. The transcript of the proceedings at that time shows that before such pleas were accepted by the trial court and sentence pronounced, each of the appellants was asked by the court whether he desired to consult with a friend or an attorney, and he said he did not so desire. Each was asked if he was guilty, and each said that he was guilty. * * * * *

After questioning the defendants further regarding their guilt, the trial court made this announcement and entered the same upon his docket:

"Defendants plead guilty, waiving consultation. Each is sentenced to 15 years in the state penitentiary."

Speaking of the application of Section 558.380, supra, to such a state of facts, the Supreme Court said (285 S.W. 976, l.c. 978):

Hon. J. B. Schnapp

"Without considering the effect of the violation of such statute upon the validity of a plea of guilty accepted in violation of it, it is sufficient to say that the record before us conclusively shows that the trial judge fully complied with the statute in accepting the pleas of appellants."

This case is authority for the proposition that time to consult with friend or attorney may be waived.

You next inquire, when a continuance is granted to give the defendant time to consult with a friend or attorney, whether the court should issue a "warrant of commitment pending plea" or whether the defendant should be recommitted on the original warrant.

The matter of commitment will be treated just as commitment upon continuance for any other cause. The Supreme Court rule governing the matter is Rule 22.03 reading thus:

"If the defendant shall fail or refuse to enter into such bond the magistrate shall commit him to the common jail of the county or of the city where the trial is pending, there to remain until the day fixed for the trial of the charge alleged against him."

The commitment should not be "on the original warrant" (which we take to be the warrant of arrest), but should be an order to the sheriff to commit the defendant to jail until the trial date. The warrant of arrest simply orders the arrest of defendant and bringing him before the court. The paper delivered to the sheriff on which the order is written might perhaps be called a "warrant of commitment", although it would make no difference, it appears to us, whether the words, "pending plea" were added to the title of the paper.

CONCLUSION

It is the opinion of this office that:

- 1) The opportunity and reasonable time to consult with a

Hon. J. B. Schnapp

friend or attorney, required to be given by Section 558.380 RSMo 1949, must be given at the time of arraignment, even though previously thereto defendant has had such opportunity and time.

2) A defendant charged with a misdemeanor in Magistrate Court should be accorded an opportunity to consult with a friend or attorney. But he may waive the right to do so, in which case the magistrate is not obliged to grant a continuance or "reasonable time" to do so.

3) When a continuance is granted to allow the defendant to consult with a friend or attorney, he not making bail, the Magistrate should make an order committing him to the County jail.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

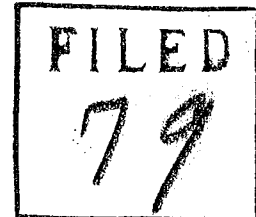
Yours very truly

JOHN M. DALTON
ATTORNEY GENERAL

WDK:A

SCHOOL DISTRICTS: Duties of county clerk and county assessor
COUNTY CLERK: respective when boundary line between school
COUNTY ASSESSOR: districts is in dispute.

October 7, 1954



Honorable J. B. Schnapp
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department, reading as follows:

"The county clerk of this county has requested that I secure from you an opinion advising him and the assessor what action they should take under the following facts, to-wit:

"On or about May 31, 1954 the county assessor made his return of the assessor's book to the county court pursuant to Section 137.245 R.S. Mo. 1949.

"A certain area of land all within Madison County is claimed by School District C-2 to lie within its boundary and the same area is claimed by School District 14 to lie within its boundary.

"The assessor's book for 1954 for lands designated the area to be in School District C-2 but his book assessing personal property designated the property of persons living within the said area as being situated in School District 14.

"On or about June 11, 1954, and subsequent to the assessor making the aforesaid return of this book for 1954, a group of qualified voters residing in the disputed area petitioned School District 14 and alleged that

Honorable J. B. Schnapp

the aforesaid area was unorganized territory and petitioned that the said area be attached to School District 14, as provided in Section 165.163 R.S. Mo. 1949. School District 14 approved the petition and certified its action to the county clerk.

"The county clerk now proposes after receipt of the certified petition of School District 14 to extend the land levy covering this alleged unorganized territory to School District 14. School District C-2 is objecting to this action claiming that they are entitled to have the levy on the real estate extended to the credit of their district and to also have the personal property levy extended to the credit of their district.

"The disputed area has been assessed in first one and then the other of the two aforesaid districts down the years, but the realty and personalty were both assessed in School District C-2 in 1953.

"Both school districts complied with Section 165.077 R.S. Mo. 1949 by submitting to the superintendent and he to the county clerk their respective estimates for 1954.

"A suit is being instigated by one of the districts in the circuit court to try, determine and quiet the boundary between School District C-2 and School District 14.

"The area in dispute involves surface rights in and to the land only. The so called underground rights or mineral rights are owned by a mining company and are assessed in School District C-2 in 1954 and have never throughout the years of dispute over the surface rights appeared on the assessor's books for any other school district.

"The County Clerk desires to know what action he should take in this matter. I believe that it would also be advisable to know what action the assessor should take in this question.

Honorable J. B. Schnapp

"Under the ruling of the court in the case of State vs. Blackwell, 254 SW2nd, 243, it is conceivable in my mind that both districts could mandamus the clerk to extend the levies to their credit.

"I understand that School District C-2 has threatened mandamus to compel the assessor to assess the personal property, as he did the realty in School District C-2 in 1954 and also has threatened mandamus to compel the county clerk to extend the levy by districts designated by the assessor's book without regard by the action taken by School District 14 in attaching the aforesaid area as unorganized territory. In my opinion, if the county clerk does so, as well as the assessor, then School District 14 will probably institute a similar action in injunction to prevent the clerk from so doing."

Fundamentally, the question presented in your opinion request is the actual situs of the real and personal property referred to therein with respect to the imposition of levies of school taxes. It further appears that the matter is now in actual litigation and that a judicial determination will be had of the correct boundary line between the two districts. With this once definitely established, it appears that no future controversy need arise, nor should any impediment exist, with respect to the discharge of their official duties by the respective officers in connection with the subsequent assessment levy and extension of taxes on behalf of the interested school districts.

With respect to the duties of the county assessor, it appears that under the provisions of Section 165.083, RSMo 1949, it is the duty of the county assessor to obtain the number of the school district wherein each resident taxpayer resides. With respect to nonresident owners of real property, it, of course, becomes necessary that the county assessor resort to the plats of the various school districts on file in order to ascertain the proper school district within which such real property is located. Further than this, it seems that the county assessor has no duties in the matter, and inasmuch as your letter of inquiry discloses that the time has long passed for the county assessor to make any changes or alterations in the current tax books, it seems that nothing further remains for him to do.

Honorable J. B. Schnapp

Under the provisions of Section 165.077, RSMo 1949, with which statute, as we understand it, both of the contesting school districts have complied, the necessary estimates were certified to the county clerk for the current year. It thereupon became the duty of such official, under the provisions of Section 165.083, RSMo 1949, to extend upon the tax books of the county the proper levy based upon the estimate of each district. For the moment this, of course, would result in dual taxes being assessed and extended upon the real and personal property situated within the disputed area. However, there ultimately can only be one valid assessment and extension of taxes, and that will be determined in the litigation to which you have referred in your letter of inquiry. We do feel that to protect the levy on behalf of whichever school district ultimately prevails in the litigation the county clerk should extend each levy upon all of the land within the disputed area.

We have examined the reported case of State v. Blackwell, 254 S.W. 2d 243. We find nothing therein which we think affects our opinion in this matter. We do note that in the case mentioned the court emphasized that, under similar circumstances to those existing in your county, it is not the duty of the county clerk to in any manner attempt to determine the rights of the respective districts. That is a matter for judicial determination. The suit was one directed at the county clerk of Ray County seeking by mandamus to require such official to extend a duly certified levy. In his return to the alternative writ the respondent, in effect, advanced the claim that the real and personal property upon which it was sought to enforce the extension of the levy were not a part of the relator school district. The court held that this was no defense by such official and, quoting approvingly from State ex rel. v. Jones, 8 S.W. 2d 66, 320 Mo. 353, said:

"It must be borne in mind at this point that school districts Nos. 20 and 21 in New Madrid county are not parties to the proceeding nor complaining here. This court held in State ex rel. (Consolidated) School District No. 1 v. Hackmann, 277 Mo. 56, 209 S.W. 92, a proceeding by mandamus to compel the state auditor to register bonds voted and issued by relator, that the respondent state auditor did not represent and had no right to represent or litigate the rights of those school districts. The same is true of the county

Honorable J. B. Schnapp

clerk here. He does not represent school districts Nos. 20 and 21. It may be said further that he does not represent individuals whose land is sought to be taxed. Those very persons, at least a majority of them, whose lands the relator seeks to have extended for taxation in the district, have recognized the district, sent their children to school there, voted there, and served as officials there. They are not complaining and the respondent has no right to complain for them under that ruling. In the Hackmann Case some of the very facts alleged here to show laches or to show want of organization were determined against respondent by this court. The persons whose land is sought to be taxed are not complaining; the respondent has only a ministerial duty to perform; he is in no position under his return to question either the incorporation of relator or the inclusion of the land in New Madrid county within the district."

CONCLUSION

In the premises, we are of the opinion that under the circumstances outlined in your letter of inquiry no further duties remain to be discharged by the county assessor of Madison County.

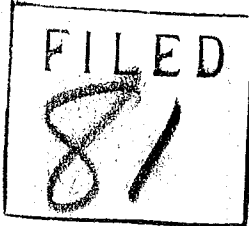
We are further of the opinion that it was, and is, the duty of the clerk of the Madison County Court to extend the respective levies certified to such official by the respective school districts upon the valuation of all the real and tangible personal property taxable within the area in dispute. It is our further opinion that in doing so such official should apply each rate of levy to each item of valuation so that, in effect, two complete computations of taxes will be made. It is our further opinion that only one of such tax levies will be valid dependent upon the judicial determination made in the pending litigation involving the boundary line between the respective districts.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

BOUNTIES: There is no statute in this State authorizing County Courts of any county of any class in this State to set and pay out of the county treasury bounties on foxes or fox puppies.



February 15, 1954

Honorable D. W. Sherman, Jr.
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Mr. Sherman:

This is the opinion you requested on the question of whether the County Court of a third class county may set and pay out of the county treasury a bounty on foxes and fox puppies killed by citizens within the geographical limits of such county. Your letter requesting this opinion reads as follows:

"I have been requested by the County Court of Lafayette County to request the following opinion of your office, to-wit:

"May a County Court of a third class County set a bounty on fox and fox puppies, to be paid out of the County treasury for fox and fox puppies killed by citizens, when same are killed within the geographical limits of the County and when the County Clerk keeps a record, as provided in cases of foxes, etc. in chapter 279, Missouri Revised Statutes of 1949?

"Further would said payment on the bounty be an authorized expenditure if said sum was reasonable and followed the amount set forth in the above described chapter, providing further that the authorized order of said Court complied with any rule and regulation promulgated by the said Conservation Commission?"

Hon. D. W. Sherman, Jr.

Your letter refers to Chapter 279, RSMo. 1949, and the record required by Section 279.040 of such chapter to be kept by the County Clerk of any county where bounties are paid on wild animals named in the chapter which are taken by citizens of such county. It is noted specially in paragraph 2 of your letter requesting this opinion you refer to the record to be kept by the county clerk "as provided in cases of foxes, etc., in Chapter 279, Missouri Revised Statutes of 1949?" Chapter 279, RSMo. 1949, does not require a record to be kept of foxes or fox puppies killed in any county in this state. Said chapter does not refer to foxes or fox puppies in any manner. Such animals are not made the subject of the payment of bounties upon being killed in the county.

There were amendments made by repeal and re-enactment of Sections 279.010 and 279.030, H.B. 88 by the 67th General Assembly of this state (Cumulative Supplement, Laws of Missouri, 1953, page 424).

Sections 279.010 and 279.030 before they were repealed, provided for the taking of and payment of bounties on coyotes, wolves and wildcats. Upon the repeal of said Sections 279.010 and 279.030, RSMo 1949, and the enactment in place and stead thereof, of said Sections 279.010 and 279.030, H.B. 88, 67th General Assembly, Cumulative Supplement, Laws of Missouri, 1953, both new sections refer in like manner only to the taking of coyotes, wolves and wildcats and the payment of bounties therefor. In none of these sections repealed or re-enacted was there or is there any provision made for the taking of foxes and fox puppies or the payment of bounties therefor, if and when taken by the citizens in any county of this state.

It is not deemed necessary, in the interest of brevity, to quote the sections repealed and re-enacted on the subject of the killing of coyotes, wolves and wildcats, and the payment of bounties thereon, since said section may readily be observed and read at the citations given referring thereto. Chapter 279, RSMo 1949, as amended, H.B. 88, 67th General Assembly, Cumulative Supplement, Laws of Missouri, 1953, page 424, refer only to the taking and payment of bounties on coyotes, wolves and wildcats. The sections on the subject do not include foxes or fox puppies in naming the wild animals which may be killed and upon which bounties may be paid by counties in this state, including counties of the third class. It is apparent, therefore, that the Legislature did not intend that bounties should be paid upon any other class of wild animals than those expressly named in Chapter 279, RSMo 1949, when killed within the geographical limits of the counties.

A familiar rule of construction announced and followed by the text writers and by the Appellate courts of this state applied in the construction of statutes is that the expression of one subject

Hon. D. W. Sherman

by the provisions of a statute implies the exclusion of all other subjects. 59 C.J., page 984, states the rule as follows:

"* * *Where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned; * * *."

This rule was discussed and applied by our Springfield Court of Appeals in the case of *Crevisour et al. vs. Hendrix*, 136 S.W. 2d. 404, in a workmen's compensation case. The question was whether, under a section of the Compensation Act of this state which provided that where an employer employed more than ten men regularly he became a major employer or whether in order for such employer to be a major employer such employees should be employed for five and one-half consecutive days in addition to being ten in number to make the employer a major employer. The decision by the Springfield Court of Appeals held that the statute providing that the employment of ten men regularly constituted the employer a major one, and that this was sufficient, excluding all other conditions of employment. The Court, l.c. 408, applying the above-noted rule to its decision, said:

"It is an elementary rule of almost universal application that the expression of one thing is the exclusion of another; * * *."

This rule was applied by the Supreme Court of this state to the facts and conditions in the case of *State ex rel. Conkling, Prosecuting Attorney vs. Sweaney, et al.* 270 Mo. 685. The Court considered and determined the question in the construction of a statute relating to the boundary lines and property of common school districts as to whether the provisions of the statute respecting the division of property between common school districts when boundary lines were changed, applied to town, city and consolidated districts by authorizing the division of a town, city or consolidated school district into two new school districts. The Court held that this could not be done; that the statute providing for the division of common school districts did not apply to or include village school districts. The Court said in applying this rule of construction, l.c. 691, 692, the following:

"* * *Such being the case the Legislature, when it enacted Section 10881, knew that the provisions of Section 10837, relating to the division of one common school district into two new districts, would not apply to town or consolidated districts unless it so

Hon. D. W. Sherman

provided in the act, and knowing this to be true and failing to so provide it would be but to do violence to the plain language used to hold that it expressed an intention to apply provisions other than those expressly mentioned. To so hold would be to violate the well known canon of statutory construction, viz.: That the expression of one thing is the exclusion of another."

It would, therefore, appear plain, we believe, that Sections 279.010 and 279.030, H.B. 88, 67th General Assembly, Cumulative Supplement, Laws of Missouri, 1953, page 424, (RSMo. 1949) in expressly providing for the killing and payment of bounties therefor on coyotes, wolves and wildcats, all other wild animals including foxes and fox puppies, are excluded from the terms thereof, and that under the decisions noted so applying said rule of construction, the payment of a bounty or bounties for the killing of foxes or fox puppies would not be an authorized expenditure by a county of the third class, or any other class, in this state, out of public funds.

CONCLUSION

It is, therefore, considering the premises, the opinion of this office that counties in this state, including class three counties, are not authorized to pay bounties for foxes or fox puppies killed within the geographical limits of such counties under the provisions of Chapter 279, RSMo. 1949 as amended.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. George W. Crowley.

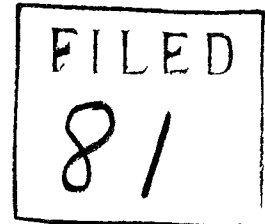
Yours very truly,

JOHN M. DALTON
Attorney General

GWC:irk:mw

COUNTY ASSESSORS: County assessor elected at 1952 general election served until death in December 1953.
VACANCIES: Governor subsequently appointed one to fill vacancy under authority of Sections 53.010 and 105.030, RSMo 1949, and appointee could not serve full unexpired term of deceased. Successor must be elected for unexpired term at general election in 1954, but such term will not begin until September 1, 1955.

April 7, 1954



Honorable W. D. Settle
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Sir:

This department is in receipt of your recent request for legal opinion, which reads as follows:

"I respectfully request an official opinion on the following proposition:

"In December, 1953, the assessor of Howard County, who was elected in 1952, died and the Governor issued a Commission to a successor to serve until 'his successor is duly elected or appointed and qualified.' The question arises whether this appointment is good for the full unexpired term of the deceased or must the office be filled in the 1954 election. If the latter is true, will the person elected serve a full term of four years or only the unexpired term.

"The County Clerk requests that you render this opinion as soon as possible so that he will know whether to accept Declaration of Candidacy before the deadline of April 27."

Chapter 53, RSMo 1949, is entitled "County Assessors," and contains all the general statutory provisions in regard to the election, term, duties, and other miscellaneous matters pertaining to the office of county assessor. However, no section of

Honorable W. D. Settle

this chapter prescribes the procedure that shall be followed in filling vacancies caused by the death, resignation or removal of the incumbent of this office. Section 53.010, RSMo 1949, specifically provides for the election of an assessor in each county of the state, his term of office, and when he shall enter upon the discharge of his duties. Said section reads as follows:

"At the general election in the year 1948 and every four years thereafter the qualified voters in each county in this state, except those under township organization, shall elect a county assessor. Such county assessors shall enter upon the discharge of their duties on the first day of September next after their election, and shall hold office for a term of four years, and until their successors are elected and qualified, unless sooner removed from office; provided, that this section shall not apply to the city of St. Louis."

Section 4 of Article IV of the Constitution of Missouri, 1945, empowers the Governor to fill all vacancies in public office unless otherwise provided by law, and reads as follows:

"The governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified."

Section 105.030, RSMo 1949, provides that when any vacancies shall occur or exist in any state or county offices originally filled by election by the people, except those specifically named, that all such vacancies shall be filled by appointment of the Governor. We note that the office of assessor is not among those excepted from the operation of this section. Therefore, in our opinion, the Governor is authorized to appoint one to fill a vacancy in the office of county assessor. Said section reads as follows:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office

Honorable W. D. Settle

originally filled by election by the people, other than the office of lieutenant governor, state senator, representative, sheriff, or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election - at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election; provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date." (Emphasis ours.)

In the case of State ex rel. Bothwell v. Green, 352 Mo. 801, the facts involved were similar to those given in the opinion request. In that case the collector of Pettis County had been re-elected at the general election in 1942 for a four-year term commencing March 1, 1943, but died on December 25, 1942. A vacancy was thereby created, which was filled by appointment of the Governor under authority of Section 11509, R. S. Mo. 1939 (now Sec. 105.030, RSMo 1949). The court held that the appointee was not entitled to hold office for the entire term of four years but only until a successor was elected at the next general election in 1944 and had qualified, and also that the successor would hold office only for the unexpired term. It was also held by the court that said appointee could not hold the office beyond the date when the term of the newly elected collector should begin. At l.c. 805-808, the court said:

"The question for decision is whether Hazel Palmer, after serving the unexpired term, holds over for the full regular term of four years from March 1, 1943; or whether the office is open for election for the remainder of the regular term at the general

Honorable W. D. Settle

election to be held in November of this year.

* * * * *

"There is a general statute on the filling of vacancies, Section 11509, R.S. 1939, which provides: * * *

"We must read in conjunction with the statute on collectors the general statute on filling vacancies. This was the ruling in State ex inf. Barker v. Koeln, 270 Mo. 174, 192 S.W. 748 in which we held it was proper to elect in an off year for the unexpired term of the office of collector a successor to one who was appointed to fill a vacancy. It was also held in State ex inf. Major v. Amick, 247 Mo. 271, 152 S. W. 591, supra, that the general statute on filling vacancies is to be considered together with the statutes relating to the offices to which it applies. See also State ex inf. Hadley v. Herring, 208 Mo. 708, 106 S.W. 984. Clearly in this case the office became vacant upon the incumbent's death and Section 11509 furnished the authority to fill the vacancy and the conditions on which it was to be filled.

"Applying the provisions of Section 11509 to this case we find: a vacancy occurred upon the death of Greer; the vacancy was filled by the appointment of Hazel Palmer; her term under the appointment expires at the day designated for the beginning of the term, that is March 1, after the first ensuing general election, namely the general election to be held in November, 1944; and her successor should be elected to serve the remainder of the term at the general election in November, 1944.

* * * * *

"The legislative policy for filling vacancies has been described by the learned Judge

Honorable W. D. Settle

White in State ex inf. Barrett v. McClure, 299 Mo. 688, 253 S.W. 743. That case construed Section 11509 and held it plainly provided an election may be had for an unexpired term and the governor would have no authority to make an appointment which would conflict with such provision. Judge White then stated: 'Originally special elections were provided for to fill vacancies, so as to cut short the tenure of appointees. Apparently the expense and trouble of having special elections to fill vacancies caused the legislature in 1879 to provide for vacancies to be filled by appointment until the next succeeding general election. This shows that the legislative policy of the state has been to fill a vacancy for an elective office by election as soon as practicable after the vacancy occurs.'"

From the facts given in the instant case an assessor was elected at the general election held in Howard County in November, 1952, for a term of four years. After qualifying and serving only a few months the newly elected official died in December 1953. Thereafter, the Governor appointed a person to fill the vacancy in this office, and we assume that the appointee is still serving in that capacity.

The question presented in the opinion request is whether the person appointed by the Governor shall continue in office for the full unexpired term of the deceased or whether a successor to such deceased official must be chosen in the 1954 general election, and in the event the latter is true, will the person elected serve for a term of four years or only for the unexpired term.

It will be recalled that Section 105.030, supra, provides that an appointee of the Governor to fill a vacancy in office shall, after having qualified and has entered upon the discharge of his duties, continue in office until the first Monday in January next following the ensuing general election, at which election a person shall be elected to fill the unexpired portion of such term, or regular term as the case may be, and that such person shall enter upon the discharge of the duties of such office the first Monday in January next following said election

Honorable W. D. Settle

unless the term to be filled begins on some day other than the first Monday in January. In the latter event the appointee shall be entitled to hold the office until such other date.

Again, from the facts of the opinion request it is noted that the assessor of Howard County was elected at the general election in 1952. From the provisions of Section 53.010, supra, such assessor's term was for four years but did not begin until September 1, 1953, and would expire on the last day of August, 1957. However, the assessor died in December, 1953, thereby creating a vacancy in such office.

In view of the provisions of Sections 53.010 and 105.030, supra, particularly the underscored portion of the latter section, it is our thought that the person appointed by the Governor to serve as assessor of Howard County will not serve for the full unexpired term of the deceased. An assessor shall be elected at the general election in 1954 to fill the vacancy and the person who is elected will serve for the remainder of the unexpired term. However, the unexpired term will not begin until the first day of September, 1955. The appointee of the Governor now serving in that office shall continue until the first day of September, 1955.

CONCLUSION

It is the opinion of this department that when one elected county assessor at the general election of 1952, served until his death in December 1953, and the vacancy thus created was subsequently filled by appointment of the governor, under authority of Section 53.010 and 105.030, RSMo 1949, that said appointee could not serve for the full unexpired term of the deceased. A successor to the deceased must be elected for the unexpired term at the general election of 1954. Said appointee shall continue to serve in said office until the beginning date of such unexpired term on September 1, 1955.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

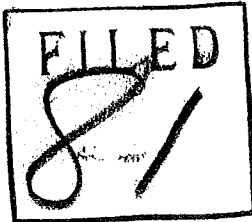
Yours very truly,

John M. Dalton
Attorney General

PNC/sm/vtl

ANIMALS: Cattle may be allowed to run at large in a township which has not voted to enforce the provisions of Chapter 270 concerning the restraint of animals from running at large, even though the owner of said cattle may be a resident of another township which has voted to enforce the law restraining animals from running at large.

April 30, 1954



Honorable William E. Seay
Prosecuting Attorney
Dent County
Salem, Missouri

Dear Sir:

By a letter dated April 22, 1954, you requested an official opinion as follows:

"A resident of this county has come into my office and stated to me that he lives in a township which has voted to enforce the provisions of Chapter 270 of the 1949 Revised Statutes of Missouri, which chapter deals with restraining animals from running at large.

"This individual lives within a quarter of a mile of a township which has not elected to come under said chapter. The individual has told me that he intends to turn his cattle out in the township which has not elected to come under chapter 270 and I should like to have an opinion as to the following.

"Will it be a violation of the provisions of Chapter 270.010 as an individual living in a township elects to come under the provisions of Chapter 270 to turn this cattle out in a township which has not elected to come under the provisions of Chapter 270."

All statutory citations herein are RSMo 1949.

Honorable William E. Seay

Section 270.080 provides that Chapter 270 shall not be enforced in any county until a majority of the legal voters of the county shall elect to enforce said Chapter in such county.

We assume from your letter that a majority of the legal voters of Dent County have not voted to enforce the provisions of Chapter 270.

In those counties which have not adopted Chapter 270, provision is made for voting on the proposition of enforcing the law restraining animals from running at large by certain types of townships. Those Sections are 270.130, 270.140, 270.150 and 270.160. Those Sections are not quoted here because of their length, and because the quotation of them is not necessary to this opinion. Suffice it to say that certain townships may adopt the law to enforce restraint of animals.

Assuming that the township in which the individual mentioned in your letter lives has legally adopted the provisions of Chapter 270, we turn to your question. That question is whether a resident of a township having voted to enforce the law restraining animals from running at large may allow his cattle to run at large in an adjoining township which has not voted to enforce said law.

It appears obvious that the enforcement or suspension of the law in the place where the cattle are actually located is controlling, and that whether the stock law is in force at the place of the residence of the owner is immaterial. This conclusion is supported by *Spitler vs. Young*, 63 Mo. 42. In that case, the owner of certain hogs resided outside of the limits of the town of Trenton. The town of Trenton had adopted an ordinance authorizing the marshall to seize and restrain any hogs found running at large in the town limits. Plaintiff's hogs had escaped from their pen outside of the town limits and were found by the marshall on the streets of Trenton. The Supreme Court made this statement as to the applicability of the ordinance of the town of Trenton to a non-resident owner, l.c. 44:

"That the plaintiff was a non-resident cannot have material effect or alter

Honorable William E. Seay

the case. It is true that the ordinance of a municipal corporation can have no extra-territorial force; but persons or property coming within the territorial limits of the corporation, come under its authority."

CONCLUSION

It is, therefore, the opinion of this office that cattle may be allowed to run at large in a township which has not voted to enforce the provisions of Chapter 270 concerning the restraint of animals from running at large, even though the owner of said cattle may be a resident of another township which has voted to enforce the law restraining animals from running at large.

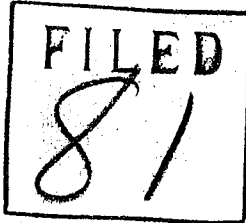
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:lvd

CIRCUIT CLERKS: Change of venue fee paid in to
the county treasury under Section
FEES: 508.230, RSMo 1949.



April 30, 1954

Honorable D. W. Sherman, Jr.
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Sir:

We have received your request for an opinion of this
office, which request reads as follows:

"Mr. O. H. Henning, Clerk of the Circuit
Court, Lafayette County, Missouri has
asked, and I request your opinion to the
following, to-wit:

What disposition should be made of
the \$10.00 filing application fee,
paid to the clerk on a change of
venue civil case?

Should said fee be paid to the State,
i.e., should the clerk of said court,
after the disposition of the change
of venue case, send the aforesaid
amount to the Office of Comptroller,
Department of Revenue, State of
Missouri, or should amount be paid
to the County Treasurer in the same
manner as other fees of the court.

"We have in our possession your opinion
dated December 5, 1946, directed to
Forrest Smith, State Auditor, which said
in substance that since said sum is a fee
of the Circuit Judge it should be paid to
the State Treasury; however since said date,

Honorable D. W. Sherman, Jr.

to-wit; in 1949 House Bill 2118 now known as section 508.230 of the Missouri Revised Statutes of 1949 would seem to require that money be paid into the County Treasury as would other fees of the jury and court reporter, for this section does not refer to this fee as the judge's fee as did the statute prior to its amendment in 1949."

Section 508.220, RSMo 1949, provides:

"Whenever any change of venue is applied for in any civil cause from any circuit court of any county, or city constituting a county, to any other county or such city, in another circuit, the party or person applying for such a change of venue shall, with his application, deposit with the clerk of the circuit court the sum of ten dollars; and thereupon, if such change of venue is awarded, the clerk of said court shall transmit said sum of ten dollars, together with the transcript and proceedings in the cause, to the clerk of the court to which the removal is ordered; and no transcript shall be transmitted or received by any clerk on such change of venue, as aforesaid, unless said sum of ten dollars shall accompany such transcript; provided, however, that whenever any cause shall be transferred to another circuit by agreement of parties, such sum shall be paid by both parties, before any change of venue is awarded, in equal shares and transmitted as aforesaid."

Section 508.230, RSMo 1949, provides:

"1. Said sum when received shall be paid into the county treasury in the same manner as other fees of the clerk of the court except that in any case in which a special judge presides, said ten dollar fee shall be paid to such special judge after a trial had or upon the final disposition of the cause in the court."

Honorable D. W. Sherman, Jr.

"2. All moneys received by the clerk of the circuit court of the city of St. Louis under and by virtue of the provisions of this and section 508.220, shall be paid by him into the city treasury, and used for the payment of the salaries of the circuit judges and court stenographers of said city.

"3. If no change of venue is granted, the money paid under this and section 508.220 shall be returned to the party or parties paying the same."

In view of the provision of Section 508.230, above quoted, which requires that the fee be paid into the county treasury, the question involved is whether or not this provision is constitutional. If it is, it, of course, governs the disposition to be made of the fee. The constitutional provision involved is found in Section 24, Article V of the Missouri Constitution of 1945. That section deals with the salaries and compensation of judges, and contains the following provision: "The fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

In the opinion of this office dated December 5, 1946, to which you refer in your opinion request, it was concluded that the fee under the statute as it then stood (Sec. 1074, R.S. Mo. 1939) was a fee of the court and that its disposition was governed by the constitutional provision referred to from and after the effective date of the 1945 Constitution. At that time the section read as follows:

"The clerk of any circuit court receiving with any transcript said sum of ten dollars shall pay said sum to the judge of the circuit court, or to any special judge trying such case, after a trial had or upon the final disposition of such cause in said court: Provided, that if no change of venue is granted, the money paid under this and the preceding section shall be returned to the party or parties paying the same; Provided, however, that all moneys received by the clerk of the circuit court of the city of St. Louis, under and by virtue of the provisions of this and the preceding

Honorable D. W. Sherman, Jr.

section, shall be paid by him into the city treasury, and used for the payment of the salaries of the circuit judges and court stenographers of the said city."

The statute was revised by the 1949 Legislature in view of the constitutional provision above referred to.

A fundamental rule of constitutional law is that an act of the Legislature is presumed to be constitutional and will be so declared by the courts unless it is plainly shown to violate the Constitution. Insofar as Section 508.230 is concerned, it appears to us that the Legislature by its amendment of this section in 1949 removed this \$10.00 fee from the status of a fee of the court or judge. It will be noted that that section requires a sum to be paid into the county treasury "in the same manner as other fees of the clerk of the court." By reference to the fee in this manner it appears that the Legislature intended that by its amendment the fee should be classified as a fee of the clerk rather than a fee of the court or judge. Inasmuch as this fee is purely a creature of the Legislature, there appears to be no inherent reason why the Legislature should not determine the nature of the fee. In view of the presumption of validity above referred to, we cannot state that the Legislature's determination regarding the disposition of the fee is contrary to Section 24 of Article V of the Missouri Constitution, 1945, and therefore the fee should be disposed of as required by Section 508.230, RSMo 1949.

The foregoing relates only to the situation when a special judge does not preside. Inasmuch as your inquiry relates to the clerk's disposition of the fee as between the county and state, we do not pass upon the situation when a special judge presides.

CONCLUSION

Therefore, it is the opinion of this office that the change of venue fee of \$10.00 required to be paid under Section 508.220, RSMo 1949, should, in cases in which a special judge does not preside, be disposed of by the clerk of the circuit court in the manner prescribed by Section 508.230, RSMo 1949, by payment into the county treasury rather than to the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

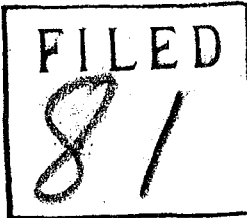
Yours very truly,

JOHN M. DALTON
Attorney General

RRW:m1

RESERVE MILITARY FORCE:
/SKELETAL BASIS:

The State of Missouri may organize and maintain and pay the expenses of such maintenance of a cadre reserve military force without the consent of Congress or authorization by the Federal Government.



May 20, 1954

Honorable A. D. Sheppard
Adjutant General of Missouri
State Office Building
Jefferson City, Missouri

Dear General Sheppard:

This will be the opinion you requested by letter from this office asking whether the State of Missouri may organize and maintain a reserve Military Force on a cadre basis without the consent of Congress and, whether the state may equip members of such cadre military organization. Your letter contains informative matter, including reference to the National Defense Act, Section 10 of Article I of the Constitution of the United States, a brief statement of the organization and maintenance of a Home Guard in the First World War, a State Guard during the existence of the Korean Emergency, but which, however, was never perfected, a statement outlining the purpose for which such cadre force would be organized and maintained, the relationship of such force to the National Guard in State Emergency Plans, the responsibility of undertaking a military mission on behalf of this state when and after other duly authorized military organizations are inducted into Federal service, and to act in case of Emergency when there is no other available military organization within the state to perform such services. We deem it unnecessary to quote such parts of your letter here. However, such references and suggestions will be considered in the preparation of this opinion. That part of your letter requesting the opinion and identifying the subject to be considered, reads as follows:

"1. Your opinion is requested as to whether the State of Missouri may organize and maintain a Reserve Military Force on a cadre basis without the consent of Congress or authorization of the Federal Government and pay and equip the members of such a skeletal military organization."

Hon. A. D. Sheppard

Your letter cites as statutory authority in this state for the organization and maintenance of a reserve military force Section 41.760, (Laws Mo. 1951, p. 654) 1953 Cum. Supp., p. 42. Said Section 41.760 reads as follows:

"When the organized militia, including the national guard and air national guard are absent from the state in federal service, or when for any reason the strength of the same is not adequate to furnish a force sufficient to execute the laws, suppress insurrections, repel invasion, suppress lawlessness and provide emergency relief to distressed areas in the event of earthquake, flood, tornado, or other actual or threatened enemy attack or public catastrophe creating conditions of distress or hazard to public health and safety beyond the capacity of local or established agencies, the governor shall have the power, when authorized by the federal government, to organize from the unorganized militia of Missouri, a reserve military force for duty within or without the state. Such force shall consist of such organized troops, auxiliary troops, staff corps and departments as he may deem necessary. He shall prescribe the strength and composition of the various units of the same, and the qualifications of its members. The governor shall have the power to grant discharges therefrom for any reason deemed by him sufficient."

Section 41.760, supra, is positive and clear in providing that when the emergencies or dangers, or any of them, noted in the said section, are threatened, or exist within this state, the Governor shall have the power when authorized by the Federal Government, to organize from the unorganized militia of Missouri a reserve military force for duty within or without this state. It is made equally clear and plain in your letter requesting an opinion that it is not the purpose here to organize a military force as if for service or action at this time, but to organize and maintain a force on a cadre or skeletal basis before the National Guard has been inducted into federal service and before state military forces have been organized, which cadre could be quickly expanded with Federal authority into an effective force. We find nothing in said Section 41.670 or elsewhere in state or federal statutes prohibiting the organization and maintenance of such a cadre military force. Your letter refers us to Section 10 of Article I of the Federal Constitution which denies the states certain powers. In the third paragraph of said Section 10 it is provided that "no state shall, without the consent of Congress * * *keep troops * * *in time of peace."

Hon. A. D. Sheppard

We believe the organization, maintenance and equipment of a cadre of a reserve military force by the Governor of this state would, in no sense, amount to keeping "troops" within the state in time of peace without the consent of Congress, so as to be a violation of said Section 10, Article I, of the Federal Constitution.

The keeping of "troops" by the state implies that they are presently active, or potentially active in military service. The term "troops" is defined in 64 C.J., page 1313, thus:

"In a military sense, it is said that the word has an established meaning, as the designation of a body, or muster of soldiers; an army; soldiers collectively. The term is one that conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service, answering to the regular army, although it has been said that the term is not confined to land forces but may include men and officers in every branch."

The Supreme Court of the United States in *United States v. Union Pac. R.R. Co.* 249 U.S. 354, l.c. 356, defined "troops" as follows:

"In 1850 the word 'troops' had (and it has ever since had) an established meaning;--namely, 'soldiers collectively,--a body of soldiers.'
* * *

The question of whether a state militia constituted "troops" within the meaning of Section 10, of Article I of the Federal Constitution prohibiting the states from keeping "troops" in time of peace, was before the Supreme Court of the State of Illinois in *Peter J. Dunne v. The People of the State of Illinois*, 94 Ill. Rep. 120. The Supreme Court of that state held that the militia was not to be considered "troops" within the meaning of the word "troops" as contained in said Section 10 of said Article I of the Federal Constitution. The court so holding, l.c. 138, said:

"* * *Such an organization, no matter by what name it may be designated, comes within no definition of 'troops,' as that word is used in the constitution. The word 'troops' conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service, answering to the regular army. The organization of the active militia of the State bears no likeness to such a body of men. It is simply a domestic force as distinguished from regular 'troops,' and is only liable to be called into service

Hon. A. D. Sheppard

when the exigencies of the State make it necessary. * * *

We believe it is clear that under the terms of Section 10 of Article I of the Constitution of the United States, and Section 41.760, (Laws Mo. 1951, page 654) 1953 Cum. Supp., page 42, RSMo. 1949, the organization and maintenance of a reserve military force by the Governor of this state on a cadre basis is not prohibited by federal or state laws and does not require the consent of Congress and does not, in the opinion of this office, violate the provisions of the Federal Constitution which provide that a state shall not keep troops in time of peace without the consent of Congress.

The organization and maintenance of a cadre military reserve force as proposed here, according to statements in your letter requesting an opinion is so that it may be quickly expanded, with federal authority, into an effective force. The need for a state military reserve force may arise if and when the State National Guard may be inducted into Federal Service, and in the absence of such a cadre force the state would find itself without an organized military reserve force. It is apparent that the organization and maintenance of such a cadre military force would not constitute the keeping of "troops" in the state without the consent of Congress within the meaning of the Constitutional provision here noted and discussed.

CONCLUSION

It is, therefore, considering the premises, the opinion of this office that the State of Missouri may organize and maintain a reserve military force on a cadre basis without the consent of Congress or authorization of the Federal Government, and pay and equip the members of such skeletal military organization.

This opinion, which I hereby approve, was written by my assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON
Attorney General

GWC:mw

SCHOOLS: Children may not be transported to
SCHOOL FUNDS: private schools at the expense of
SCHOOL BUS TRANSPORTATION: the public school district.



June 14, 1954

Honorable D. W. Sherman, Jr.
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Mr. Sherman:

This is in response to your request for opinion of recent date, which reads, in part, as follows:

"On previous occasions I have been requested by the Higginsville Consolidated School District of Lafayette County, Missouri, together with the parochial Lutheran school in Higginsville, Missouri, to answer the following question that has been debated and that both will be concerned with within the next few months. The question I should like your opinion on is as follows, to-wit; 'May a private bus owner enter into a contract with a public school board for the transportation of public rural school students, and the same said private bus owner contract with the parents and/or board of parochial school, for the transportation of parochial students, charging different rates for the parochial students as he charges for the public students, or must the rates be the same?'

"Would the answer to the above question be the same if the contract carrier was a member of the public school board?"

Since the rendition of the decision in the case of McVey v. Hawkins, 258 S.W. (2d) 927, this office has been called upon to render several opinions on questions and problems that have arisen thereunder. Among these opinions was one directed to Honorable F. E. Robinson under date of August 27, 1953, a copy of which we enclose.

Honorable D. W. Sherman, Jr.

You will note that the Robinson opinion holds that a private individual who contracts with a school district for the transportation of public school children in a privately owned bus and receives pay therefor from public funds of the district may also contract with the parents of individual children or any other person or with a private school for the transportation of such children to a private school, transport such children in the same bus used in transporting the public school children and receive pay therefor from such individuals or private school. Your instant request raises the further question as to whether under a situation such as this the private bus owner must charge the same amount for transporting the private school children as he charges for transporting the public school children under his contract with the school board.

This problem arises out of the holding in the McVey case, supra, wherein the court concluded as follows:

" * * * We must and do hold that the public school funds used to transport the pupils part way to and from the St. Dennis Catholic School at Benton are not used for the purpose of maintaining free public schools and that such use of said funds is unlawful. It necessarily follows that such transportation of said students at the expense of the district is unlawful and must be enjoined. We express no opinion on any issues not directly decided herein."

It is apparent then that the essence of the court's decision is that children cannot be transported to private schools at the expense of the public school district.

In answering the problem presented by your request the only extent to which either we or the school board should be concerned about what the private bus owner charges for hauling either the public school children or the private school children is insofar as it bears on the basic question of whether in fact private school children are being transported at the expense of the district.

It can be readily seen that no rule applicable to all situations can be laid down whereby it can be determined under any given set of facts just how much the private bus owner must charge for hauling the private school children. The yardstick and guiding principle to be applied in each case is and must be: Are the

Honorable D. W. Sherman, Jr.

private school children in fact being transported at the expense of the district? If they are not, then the amount that the private bus owner receives from private individuals for transporting the private school children is immaterial. On the other hand, if any amount of the expense of transporting the private school children is in fact being defrayed by the district, then such expenditure is unlawful and the board of directors may be subjected to individual liability for the amount thus unlawfully expended (State to Use of Consol. School Dist. No. 42 of Scott County v. Powell, 359 Mo. 321, 221 S.W. (2d) 508).

Therefore, it is impossible to answer your first question in general terms because the inquiry by the board should be not how much the bus owner should charge the private individuals for transportation of children to private schools but, rather, how much it should pay for the transportation of public school children. If the board does in fact pay only for transportation of public school children, then it is of no concern to the board how much the private bus owner charges for transporting private school children.

In answer to your second question we are enclosing a copy of an opinion rendered to Honorable Fred C. Bollow under date of June 30, 1948. This opinion holds that a member of a school board cannot contract in his private capacity with the board of which he is a member.

CONCLUSION

It is the opinion of this office that the mere fact that a private bus owner charges a rate for transporting children to private schools which is different from that which he charges the public school district for transporting children to public schools does not in and of itself render such arrangement illegal, but that such arrangement would be illegal only if the facts showed that in some way public school money was being used to pay for the transportation of private school students.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

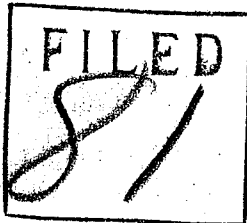
JOHN M. DALTON
Attorney General

JWI:ml

Encs (2): Opn. F. E. Robinson, 8-27-53;
Opn. Fred C. Bollow, 6-30-48.

CHILDREN:
PUPILS:
SCHOOL DISTRICTS:
TUITION:

A child having a temporary or permanent home in the school district, said child being unable to pay his tuition, and whose parents do not contribute to his support, is entitled to attend the schools of that district without payment of tuition.



September 28, 1954

Honorable D. W. Sherman, Jr.
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Mr. Sherman:

In your letter of August 31, 1954, you requested an opinion from this office as follows:

"I have recently been asked for an interpretation of whether or not a student is exempt from payment of tuition, as provided in Section 163.101, R. S. Missouri, 1949, under the following conditions:

"A student now 9 years of age, lives with his grandfather, for many years a resident and taxpayer of Reorganized School District No. R-2, Lafayette County, Missouri. The boy, whose parents live in Clay County, Missouri, came to live with his grandparents in the month of April, 1953. No promises were made by the grandfather as to the length of time the boy should stay in his home. With the exception of brief visits with his parents the boy spends all of his time at the farm of his grandfather, assists in doing chores, etc. The boy's parents do not contribute to his support. The grandfather was not asked to pay tuition for the school year of 1953-54 but has been informed by the Board of Education that he is expected to pay tuition for the school year 1954-55. The boy does not live with his grandparents for the purpose of avoiding payment of tuition.

Honorable D. W. Sherman, Jr.

"It would appear under Section 163.101, R.S. Missouri, 1949, that the grandfather should not be required to pay tuition. Furthermore, the case of State ex rel Halbert vs. Clymer, et al, 147 S.W. 1119, seems to be in point. I shall very much appreciate an opinion from your office as to whether or not you deem the grandfather liable for tuition under the factual situation."

We presume that you intend to refer to Section 163.010, RSMo Cum. Supp. 1953, which reads:

"The board of directors or board of education shall have power to make all needful rules and regulations for the organization, grading and government in their school district - said rules to take effect when a copy of the same duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner. They shall also have the power to suspend or expel a pupil for conduct tending to the demoralization of the school, after notice and a hearing upon charges preferred, and may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same, except as provided for in section 165.257 RSMo; provided, that the following children, if they be unable to pay tuition shall have the privilege of attending school in any district in this state in which they may have a permanent or temporary home: First, orphan children; second, children bound as apprentices; third, children with only one parent living, and fourth, children whose parents do not contribute to their support; provided, further, that any person paying a school tax in any other district than that in which he resides shall be entitled to send his or her children to school in the district in which such tax is paid and receive credit on the amount charged for tuition to the extent of such school tax."

Honorable D. W. Sherman, Jr.

The above section was interpreted by the Springfield Court of Appeals in State ex rel. Halbert vs. Clymer, 164 Mo. App. 671, 147 S.W. 1119, wherein the court said, at l.c. 678:

"The statute is not ambiguous, and plainly provides that children who are unable to pay tuition, and whose parents are not contributing to their support, shall have the privilege of attending school in any district in which they may have a permanent or temporary home. It will be noticed that the privilege is granted, regardless of the residence or domicile of the parent."

The court further indicated that an exception to the statute might be raised if the pupil were brought into the district temporarily for the purpose of obtaining the benefits of the school therein, without contributing to the support thereof. However, such was not done in that case, and according to your letter was not done in the instant case. If the child is not able to pay his tuition, he falls within the fourth exemption of Section 167.010, and is thus entitled to attend school in the district without payment of tuition.

CONCLUSION

In the premises, it is the opinion of this office that a child having a temporary or permanent home in the school district, said child being unable to pay his tuition, and whose parents do not contribute to his support, is entitled to attend the schools of that district without payment of tuition.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:ld, vlw

STOCK LAW:
FOREST CROP LANDS:

In a township or county in which it is lawful for domestic animals to run at large, a person who wishes to keep such animals off of his premises must fence against them.



October 15, 1954

Honorable William E. Seay
Prosecuting Attorney
Dent County
Salem, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"By virtue of Chapter 270 of the 1949 Revised Statutes of Missouri, certain townships may restrain livestock from running at large, if the required majority of voters vote for such restraint. Chapter 254 of the 1949 Revised Statutes of Missouri deals with creating forest crop land and sub-section 2 of 254-200 specifically forbids the use of land designated as forest crop land for pasture, therefore, I should like to submit the following question:

"As a land owner who has land in a township which has not voted to restrain animals from running at large also has the same land designated as forest crop land is it incumbent on that land holder to fence out free-roaming animals in order that his land continue to be classified as forest crop land?"

Section 270.010 RSMo 1949, states that it shall be unlawful for the owner of any horse, mule, ass, cattle, swine, sheep or goat to allow such animals to run at large outside the enclosure of the owner.

However, Section 270.080 RSMo 1949, reads:

"The provisions of this chapter are hereby suspended in the several counties in this state, until a majority of the legal voters of any county voting at any general or special election called for that purpose shall decide to enforce the same in such county; provided, that

Honorable William E. Seay

only a majority of the legal voters voting on said question shall be necessary to decide its adoption or rejection."

Your situation is one where such an election as is mentioned in the above section has not been called, and it is, therefore, lawful for stock to run at large in the area in which is located the forest crop land mentioned by you.

We here direct attention to the case of Leach v. Lynch, 114 Mo. App. 391, which at l.c. 394 states:

"* * * In determining this question we note first that in this State domestic animals are commoners and have a right to run at large and the party who wishes to keep them off his premises must fence against them. (Bradford v. Floyd, 80 M. 207, l.c. 211; Woods v. Carty, 110 Mo. App. 416, l.c. 423, 85 S.W. 124; McClean v. Berkabille, 123 Mo. App. l.c. 652, 100 S.W. 1109.) By our statute, which provides for elections to determine whether domestic animals shall be restrained from running at large, we find goats included in the same category with horses, cattle, hogs and sheep, sections 4777, 4783, Revised Statutes 1899.

"Under the law in this State, where there has been no vote of the people ordering goats restrained, they have the right to run at large, and defendant, having conceded that his fence was bad, the goat in question was not a trespasser when he was found upon his premises.* * *"

In addition to holding that where, as in your situation, an election has not been had, favorable to restricting animals from running at large, that animals may run at large, the above case holds that "a party who wishes to keep them off his premises must fence against them". This would seem to be applicable in your case.

As you state, according to Section 254.200, RSMo 1949, use of lands for pasture, which lands have been classified as forest crop lands, subjects the lands to being taken out of that classification.

It would appear that a person who had land classified as forest crop land in the area where domestic animals could lawfully run at

Honorable William E. Seay

large, would have the responsibility of keeping domestic animals off of his land if he did not want the land to be subject to losing its classification. We believe that the fundamental point here is that the classified lands not be used as pasture land, and that so long as they are not so used, they would not lose their classification merely because they were not fenced. For example, these lands might be in an area where domestic animals did not graze; or they might be entirely surrounded by natural barriers which domestic animals could not pass, or the owner of the land might provide watchers to keep domestic animals off of it. So long as it was not used for pasture, we do not believe that it would be subject to losing its classification.

CONCLUSION

It is the opinion of this department that in a township or county in which it is lawful for domestic animals to run at large, that a person who has land classified as forest crop land has the responsibility of keeping that land from being used as pasture by domestic animals, which is to say that he has the responsibility of keeping domestic animals off of it. This he may do by fencing or by any other effective method. If the land is in an area where domestic animals do not graze, the land would not be subject to losing its classification because it was not fenced.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

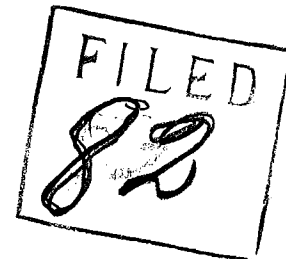
JOHN M. DALTON
Attorney General

HPW/ld

ELECTIONS: VOTING: WAGES: Employee whose working day ends at 4:30 P.M. is entitled to full day's pay when employer dismisses him from work 3:30 P.M. election day.

FILED 82

June 14, 1954



Honorable Bernard "Doc" Simcoe
State Representative
Callaway County
Route #1
Fulton, Missouri

Dear Mr. Simcoe:

We render herewith our opinion based upon your request of May 24, 1954, which request reads as follows:

"I am writing requesting an opinion on section 129.060, chapter 129, of R.S. Mo. or Senate Bill 235 which we passed last session.

"There are two unsettled questions that have come out of Senate Bill 235. First, if an employee requests a leave of absence from work prior to election, both the employee and the company agree in good faith that the designated 3 hours shall be from 4 P.M. to 7 P.M. on election day, with the 30 minutes from 4 to 4:30 being the employees working time, and the company shall compensate him for the above 30 minutes mentioned.

"However, on election day the company stops this employees working day at 3:30 P.M. instead of 4:30 P.M. as usual, or at 4 P.M. as previously agreed to. Is the employee entitled to 30 minutes compensation?

"Second, if an employee and the company participate in Section 129.060 in good

Honorable Bernard "Doc" Simcoe

faith, stopping at 4 P.M. to cast his vote, considering 30 minutes of compensation and 2 and 1/2 hours of his own time after the usual working day is concluded. Due to the large number of employees to ring out their time cards, the last few employees ring out at 4:04 P.M. Does the company have the right to dock them for 4 minutes of their allotted 30 minutes, paying for only 26 minutes instead of their promised 30 minutes?"

Section 129.060, Mo. R. S. Cumulative Supplement, 1953, S.B. 235 67th General Assembly referred to in your letter reads as follows:

"* * *Any person entitled to vote at any election held within this State, or any primary election held in preparation for such election, shall, on the day of such election be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting; and any absence for such purpose shall not be sufficient reason for the discharge of or the threat to discharge any such person from such services or employment; and such employee, if he votes, shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages; provided, however, that request shall be made for such leave of absence prior to the day of election, and provided further, that this section shall not apply to a voter on the day of election if there be three successive hours, while the polls are open, in which he is not in the service of his employer.

"The employer may specify any three hours between the time of opening and the time of closing the polls during which such

Honorable Bernard "Doc" Simcoe

employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby conferred, or who shall discharge or threaten to discharge any employee for so exercising the privilege, or who shall subject the employee to a penalty or reduction of wages because of the exercise of such privilege, or who shall directly or indirectly violate the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$500.00."

We assume that the regular working day of the employee ends at 4:30 P.M. Prior to the day of election, as provided in the above section, the employee has requested three hours leave for the purpose of voting. The employer has designated the period from 4:00 P.M. to 7:00 P.M., (the hour of the closing of the polls) as the three hour period for the employee to vote. Thirty minutes of that time would, of course, fall within the regular working day of the employee and under the requirements of the above-quoted statute, the employer would be required to pay the employee his regular compensation for that thirty minute period. On election day, however, the employer dismisses the employee for the day at 3:30 P.M. Your question in that case is whether the employee is entitled to thirty minutes compensation.

The argument of the employer against the payment of such compensation would be that the employee from 3:30 P.M. until 7:00 P.M. a period of more than three hours was "not in the service of his employer", and that therefore Section 129.060, supra, is not applicable.

We do not believe that the statute would permit the use of any such device by an employer indirectly to violate the provisions of said section. This would be accomplishing by indirection what the statute prohibits being done directly, i.e., the making of a deduction, on account of the employee's absence, from his usual salary or wages. The statute provides that any person or corporation "who shall directly or indirectly violate the provisions of this section", shall be deemed guilty of a misdemeanor.

However, there is some question whether the employee is entitled to thirty minutes compensation or whether he would

Honorable Bernard "Doc" Simcoe

be entitled to compensation for the period from 3:30 P.M. to 4:30 P.M. in the situation which you have outlined. By dismissing the employee for the day at 3:30 P.M., one hour before the end of his usual working day, we believe that the employer could be held to have designated the period from 3:30 P.M. to 6:30 P.M. as the statutory three hour voting period. This is the employer's privilege under the statute. The statute says:

"The employer may specify any three hours between the time of opening and the time of closing the polls during which such employee may absent himself as aforesaid.* *"

Therefore, the employee would be entitled to pay for the hour between 3:30 P.M. and 4:30 P.M.

In answer to your second question, contained in the last paragraph of your request, we do not perceive any basis upon which the employer could deduct from the employee's wages four minutes' compensation from 4:00 to 4:04 P.M. There would evidently be no question about the employer's liability for wages up to the time at which the time clock was punched at 4:04 P.M. The statute, Section 129.060, supra, then, would require him to pay compensation for the additional twenty-six minutes. The employer in this instance is receiving the benefit of four minutes of the employee's labor for which in this situation he would be required to pay, even though he did not actually receive it.

CONCLUSION

It is the opinion of this office that:

1) Where an employee prior to the date of an election has requested of his employer that he have three hours on election day in which to vote, the employee's usual working day ending at 4:30 P.M. under a contract of employment, express or implied, and the polls closing at 7:00 P.M., and the employer dismisses the employee from his day's work at 3:30 P.M.; the employee is entitled to one hour's wages for the period from 3:30 P.M. to 4:30 P.M.

2) Where an employee being entitled to quit work at 4:00 P.M. in order to have three hour period in which to vote

Honorable Bernard "Doc" Simcoe

on election day, actually punches the time clock at 4:04 P.M., his employer is not entitled to deduct from his wages four minutes' compensation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Don Kennedy.

Yours very truly,

JOHN M. DALTON
Attorney General

CITIES, TOWNS AND VILLAGES:
LICENSE: MERCHANTS:

City of third class does not
have power to exact license
fee from nurseryman.



June 1, 1954

Honorable George A. Spencer
Member, Missouri State Senate
Columbia, Missouri

Dear Sir:

Reference is made to your request for an official
opinion of this department which may be summarized in the
following language:

"Does a city of the third class have the
right to require a person who sells
nursery plants from an established place
of business to buy a city license?

"The seller is not a peddler of plants,
but maintains a place where people may
purchase the plants."

You have supplied us also with the following additional
information.

"* * * However, the ones I am interested
in are those who raise practically all
of the merchandise they sell. I don't
suppose that any regular nursery men
raise every particular species of every
kind of plant but most of the larger
nursery men do raise practically all of
their stock. That is the case in this
instance. * * *"

Honorable George A. Spencer

Your attention is first directed to Section 71.610, RSMo 1949, reading as follows:

"No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

From the foregoing it becomes apparent that it is necessary to examine statutes relating to the licensing power of cities of third class. We find that the power to impose such license tax has been conferred upon such cities under the provisions of Section 94.110, RSMo 1949, which reads in part as follows:

"The council shall have power and authority to levy and collect a license tax on wholesale houses, auctioneers, architects, druggists, grocers, banks, brokers, wholesale merchants, merchants of all kinds, confectioners, * * * nursery stock agents, * * * and all other vocations and business whatsoever, and all others pursuing like occupations."

The enumerated businesses are the only ones appearing in the statute, which is quite lengthy, that could conceivably refer to the operations conducted by the business houses as to which you have inquired.

The term "merchant" as used in statutes relating to the power of cities to impose license taxes has been defined by the Supreme Court of Missouri. The following appears in *Viquesney v. Kansas City*, 266 S. W. 700, 1.c. 702:

"Appellant calls attention to section 8702, R. S. 1919, which provides that no municipal corporation shall have the power to impose a license tax upon

Honorable George A. Spencer

any business, avocation, etc., unless such business, avocation, etc., is specifically named as taxable in the charter of such municipality. Section 1, art. 3, cl. 4, of the charter, enumerates 'merchants' among others who may be taxed and regulated. The dictionary definition of 'merchant' is: 'One making a business of buying and selling commodities; a trafficker; a trader.' Secondary meaning: 'One who carries on a retail business.' * * *

To the same effect see Village of Beverly Hills v. Schulter, 130 S. W. (2d) 532. In view of the information supplied this office to the effect that the businesses under consideration involve the growing and sale of nursery stock, it appears that such business operations are not comprehended within the definition of the term "merchant" as used in the license tax statutes.

Neither do we believe that such operations are such as to constitute the proprietors thereof "nursery agents." It is common knowledge that an "agent" is one who does and performs services or conducts business on behalf of a principal. It does not appear that the proprietors of the businesses under consideration acted in such capacity and we therefore conclude they are not "nursery agents."

CONCLUSION

In the premises we are of the opinion that a person whose business consists of the growing of nursery stock and the sale thereof, at an established place of business, is not engaged in any of the operations enumerated in Section 94.110, RSMo 1949, upon which a city of the third class may levy a municipal license tax.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB:vlw

NAVIGABLE RIVERS-- Ownership of sand and gravel in the beds of such rivers.

1) The Osage River in Missouri is a navigable stream; 2) Miller County is the owner of the deposits of sand and gravel in the bed of the Osage River in said county as parts of islands formed in navigable waters of this State, and holds the same for school purposes; 3) The county may sell such property for school purposes.

FILED

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October 22, 1954

Honorable LeRoy Snodgrass
Prosecuting Attorney
Miller County
Tuscumbia, Missouri

Dear Mr. Snodgrass:

This will be the opinion you requested by letter from this office on the following subject:

"Ownership of Gravel in the Osage River in Miller County, Missouri, and whether the Osage River is a navigable stream." Your request for an opinion reads as follows:

"I would like to have an opinion from your office in regard to the above matter, since it has become most important from a pecuniary standpoint, in that if the gravel belongs to the county, a considerable sum of money may be secured for the school funds of the county. (MRS - 1949 - Sec. 241.290 et seq)

"FACTS: During the past years, considerable amount of gravel and sand have accumulated in the river bed of the Osage River. Some of this gravel has been deposited by way of accretion, some by forming what we call toe-heads (islands), and some by the filling up of the river bed. Bagnell Dam regulates the flow of the water in the river to a great extent, and Union Electric has a water easement over the land below the dam that extends to about 18 foot level. Low water mark of the river leaves practically a solid gravel bar from Tuscumbia to the Homer L. Wright eddy, a bar approximately $3\frac{1}{2}$ miles long and averaging approximately 100 feet wide. Other

Honorable LeRoy Snodgrass:

are not quite as large. With the river stage at approximately 6 feet, practically all the gravel and sand is under water.

"Tens of thousands of cubic yards of gravel and sand are removed from the river bed, practically all of which is of first grade. It is being taken from the river constantly for road and construction purposes. Easements are given across town property and private property whereby trucks haul the gravel and sand from the river. Practically all the gravel is taken from above low water mark, some is taken from below the low water mark. The usual charge for the easements is based upon the gravel or sand taken, 10¢ per yard. The town of Tuscumbia and the private land owners do not sell the gravel or sand, just charge for the easements.

"QUESTIONS: Is the Osage River a navigable stream?
Is the gravel in the river, whether below or above low water mark, whether formed by accretion to land-owner's land or by toe-heads (islands), owned by Miller County? If owned by Miller County, may the County Court sell the gravel and sand per yard? By surveyed areas?"

Your letter directs our attention to Section 241.290, V.A.M.S. 1949, on the question of whether Miller County, Missouri, is the owner of such sand and gravel and holds the same as parts of islands formed in the navigable waters of this State for school purposes under the terms of said section.

Said section, under the separate sub-title of "ISLANDS AND ABANDONED RIVER BEDS", reads as follows:

"All lands belonging to the state, not otherwise appropriated under the laws thereof, which have been formed by the recession and abandonment of their waters of the old beds of lakes and rivers in this state, or by the

Honorable LeRoy Snodgrass:

formation of islands in the navigable waters of the state, are hereby granted and transferred to the respective counties in which such lands are located, to be held by such counties for school purposes."

You have favored us, at our request, with additional information indicating that some of such islands in the Osage River in Miller County, Missouri, began to be formed thirty years and more ago, and at that time steamboats were using said river for commercial navigation, which information constitutes substantial and convincing proof that at that time and for a long time prior thereto the Osage River was a navigable stream in fact.

The test of navigability of a stream, generally, in the United States, is stated in 45 C.J. 406, 407 and 408, as follows:

"For the reason that the common-law test of navigability, based upon the ebb and flow of the tide, is not adapted to a country abounding in large fresh water rivers and lakes, the rule in the great majority of the states and Canada is that water is navigable in law, although not tidal, where navigable in fact, and is navigable in fact where it is of sufficient capacity to be capable of being used for useful purposes of navigation, that is, for trade and travel in the usual and ordinary modes. This is also the doctrine of the civil law under which rivers are navigable when they are navigable in the common sense of the term and although not rivers in which the tide flows and reflows. * * *."

The Missouri Supreme Court gave a definition of the term "navigable" in State ex rel. vs. Taylor, et al., Judges of the County Court, 224 Mo. 383, l.c. 485, as follows:

"The substance of the legal definition of the latter word, as given by Mr. Burrill, is, by the common law, a river is considered navigable only so far as the tide

Honorable LeRoy Snodgrass:

ebbs and flows into it. That is also the doctrine in several of the states, but not of this State. Here all streams which are actually capable of floating and of permitting the passage of ordinary boats upon the bosom of their waters are considered navigable rivers. * * *."

In the recent case of Elder vs. Delcour, 269 S.W. (2d) 17 (not yet permanently published), South Western Advance Sheets, of date August 10, 1954, our Supreme Court gave another construction and definition of the "navigability" of a stream, l.c. 485 (Advance Sheets) as follows:

"* * * The capability of use by the public for the purpose of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. * * *."

Under the facts recited and the information conveyed to us it is indicated that the Union Electric Company has a water easement from the Federal Government over the land below Bagnell Dam in Miller County, Missouri, that extends to the prospective 18 foot level in said river; that when the Osage River stage is at approximately 6 feet in depth, practically all of the sand and gravel which constitute parts of islands in said river, is under water; that the flow of water in said river is regulated to a great extent by Bagnell Dam; that before and at the period when the islands in question began to form in the Osage River, boats carried commerce on the river to Warsaw and perhaps farther upstream of said river; that

Honorable LeRoy Snodgrass:

the Coast Guard has, presently, and exercises jurisdiction over the Lake of the Ozarks in Miller County as a part of the Osage River; that the lock and dam system of controlling the flow of water in said river in Miller County, Missouri, has been abandoned and that the gates are left open for the free flow of water through them at all times; that while commercial navigation of the Osage River is no longer carried on, yet the said river is used and navigated by smaller craft for recreation, pleasure and fishing purposes, and that at times the said river does reach, and had reached, the stage of 18 feet. These facts, all and singular, constitute substantial and convincing evidence that the Osage River was, at the time such islands in said river in Miller County, Missouri, began and continued to form therein and had been, since this State was admitted to the Union, continuously and consistently, applying the rule and test of determining navigability adopted by our Supreme Court, and still is, a navigable stream in fact.

At common law the title and dominion of lands affected by the tide were in the King for the benefit of the Nation. The American Colonies succeeded to the same rights, as grantees under royal charters, in trust for the communities to be established. Upon the American Revolution these rights charged with a like trust were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States. Upon the acquisition of the territory by the United States, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the territory. The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in tidewaters and lands under them, within their respective jurisdictions. (Shively vs. Bowlby, 152 U.S. 1, 1.c. 57).

The information so submitted to us, and our research, establish as facts that all islands formed or existing in the Osage River in Miller County, Missouri, and in all other counties of this State formed in the navigable waters of the State, at the admission of the State of Missouri to the Union, became, under the common law, the property of the State.

Honorable LeRoy Snodgrass:

The State of Missouri as the owner of lands under the navigable waters of the State took no action, made no grant, and, as our research reveals, passed no enactment alienating the title of such lands until the year 1895.

The General Assembly of this State, April 8, 1895, passed an Act (Laws of Missouri, 1895, page 207), granting certain lake and river bed lands to the counties in which they were located, to be held by such counties for school purposes.

Section 1 of said 1895 Act reads as follows:

"All lands belonging to this state, not otherwise appropriated under the laws thereof, which have been formed by the recession and abandonment by their waters of the old beds of lakes and rivers in this state, are hereby granted and transferred to the respective counties in which such lands are located, to be held by such counties for school purposes."

It will be noted that said Section 1 of the 1895 Act, supra, as it was enacted, did not include islands formed in the navigable waters of this State in the lands of the State granted, and subject to grant, by the State to the counties in which such lands are located for school purposes. Said Section 1 of the 1895 Act was amended by the Act of 1899 (Laws of Missouri, 1899, page 276) to include such islands in such State lands. Section 1 of the 1899 Act, so amending Section 1 of the 1895 Act, and providing for the granting of such islands to such counties along with other State lands for school purposes is now Section 241.290, supra, which we are here discussing.

We have herein determined and hold it to be a fact that the Osage River in Miller County is, and at all of the times herein mentioned, was, a navigable stream as of the navigable waters of this State. We have herein determined and hold it to be the further fact, also, that the islands in the Osage River in said Miller County, Missouri, including sand and gravel as component physical

Honorable LeRoy Snodgrass:

parts of such islands, were formed in said Osage River as a navigable stream of this State.

These factors and conditions bring the question here considered inevitably within the terms of said Section 241.290, supra, as to whether such sand and gravel as are parts of islands which were formed in the navigable waters of this State in Miller County, Missouri, and whether such sand and gravel are owned by said Miller County, and to be held by said county for school purposes. In view of the facts herein existing and under the law herein cited and quoted applicable thereto, it appears indisputable that Miller County, Missouri, is the owner of such sand and gravel in the Osage River and that such sand and gravel are parts of islands formed in said river as of the navigable waters of this State, and we so hold. Having answered the principal questions submitted, to the effect that said Miller County, is the owner of such sand and gravel as parts of islands which were formed in the navigable waters in the State, in this case the Osage River in said Miller County, we deem it unnecessary to refer further to your question as to the method or proceedings to be followed respecting the sale of such sand and gravel, as the property of said Miller County, other than to direct your attention to Section 49.270, RSMo 1949, which gives County Courts of the counties of this State authority to manage, control and sell property of their respective counties, either real or personal, belonging to their counties.

CONCLUSION

Considering the premises it is the opinion of this office:

1) That the Osage River in Missouri is a navigable stream;

2) That the gravel and sand deposits in the bed of the Osage River in Miller County, Missouri, as parts of islands formed in said river, a navigable stream, are owned by said Miller County and are held by said county for school purposes;

Honorable LeRoy Snodgrass:

3) That Section 49.270, RSMo 1949, authorizes the several counties of this State to sell county property, either real or personal.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Very truly yours,

JOHN M. DALTON
Attorney General

GWC:irk

MISSOURI STATE SCHOOL:



Division of Mental Diseases having established a location at Higginsville, Missouri, as a unit of the Missouri State School in pursuance of Section 202.590, RSMO 1949, it is the opinion of this office that the money appropriated for the use of the Missouri State School for "erection of a building or buildings suitable for housing 500 additional patients and equipment for such buildings" may be used to erect such building or buildings at the Higginsville, Missouri, location.

March 16, 1954

Honorable Christian F. Stipp
Representative of Carroll County
House of Representatives
Jefferson City, Missouri

Dear Mr. Stipp:

We herewith render our opinion based upon your request of February 24, 1954, which request reads as follows:

"Section 5.150 of House Bill #383 of the Sixty-Seventy General Assembly, regular session, provides as follows:

"There is hereby appropriated out of the state treasury, chargeable to the funds herein designated, for the use of the Missouri State School, for payment of salaries and wages of the officers and employees; for the original purchase of property; for the repair and replacement of property; and for the operating and other expenses; for the period beginning July 1, 1953 and ending June 30, 1955.

"For the Missouri State School, payable from General Revenue Fund as follows:

"Personal Service:

"Salaries of the superintendent, psychiatrists, psychologists, social workers, assistant physicians, dentists, steward, and other employees. . . \$1,200,000.00

"Additions:

"Erection of a building or buildings suitable for housing 500 additional patients and equipment for such buildings. \$1,000,000.00'

"This said House Bill No. 383 containing the quoted portion of said Section 5.150 was approved by the Governor on July 14, 1953.

Honorable Christiam F. Stipp

"At that time the Missouri State School consisted of the Missouri State School at Marshall, the Missouri State School at Carrollton, and the St. Louis Training School. At that time there were no schools in temporary or permanent camps established in any other place in this state by the Division of Mental Diseases within the meaning of Section #202.590, Revised Statutes of Missouri 1949.

"Thereafter, on February 3, 1954, the Director of the Division of Mental Diseases, with the approval of the Director of the Department of Public Health and Welfare, by departmental order, established upon state-owned property formerly known as the Confederate Home at Higginsville a unit of the Missouri State School.

"I respectfully request an opinion from your office on the question of whether or not the sum of one million dollars appropriated by said Section 5.150 of said House Bill #383 may be used for the erection of a building or buildings suitable for housing five hundred additional patients at Higginsville.

"In my opinion the legislature must have the correct answer to this question before it can properly consider the subject of an additional appropriation for the branch of the Missouri State School at Higginsville as requested in the recent message of the Governor, and I therefore request a prompt reply."

It is noted first, that the appropriation bill referred to, Section 5.150 of House Bill No. 383, 67th General Assembly, contains no reference to the place at which the building or buildings shall be erected. Looking only to such appropriation bill, then, there would be no legal objection to the erection of the buildings or building at Higginsville.

Does the general law contain any express or implied prohibition against the erection of such building or buildings at Higginsville? We think not, but believe that Section 202.590,

Honorable Christian F. Stipp

RSMo 1949, expressly permits the Division of Mental Diseases to establish "such other schools in temporary or permanent camps * * * in other places in this state." Said section reads in full as follows:

"There is hereby established in this state a colony for feeble-minded and epileptics, to be known as 'The Missouri State School,' which shall consist of the Missouri State School at Marshall, the Missouri State School at Carrollton, the St. Louis Training School, and such other schools in temporary or permanent camps as the division of mental diseases may establish in other places in this state."

This section after naming the Missouri State School at Marshall, the Missouri State School at Carrollton and the St. Louis Training School, provides specific authority for the Division of Mental Diseases to establish other schools in other places in this state as units of the Missouri State School. It was in pursuance of this authority that Higginsville was established as one of such units. Having been established as one of such units, it stands on the same footing as those specifically named in the law - at least so far as the appropriation measure is concerned.

Construing the appropriation bill with reference to this section, we conclude that the \$1,000,000.00 appropriated by Section 5.150 of House Bill No. 383, 67th General Assembly, may be used for the "erection of a building or buildings suitable for housing 500 additional patients and equipment for such buildings" to be located at Higginsville, Missouri, such location having been established as a unit of the Missouri State School by order of the Director of the Division of Mental Diseases with the approval of the Director of the Department of Public Health and Welfare.

CONCLUSION

The Division of Mental Diseases having established a location at Higginsville, Missouri, as a unit of the Missouri State School in pursuance of Section 202.590, RSMo 1949, it is the opinion of this office that the money appropriated for the use of the Missouri State School for "erection of a building or buildings suitable for housing 500 additional patients and equipment for such buildings" may be used to erect such building or buildings at the Higginsville, Missouri, location.

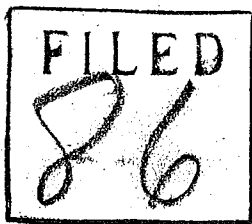
Honorable Christian F. Stipp

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Don W. Kennedy.

Very truly yours,

JOHN M. DALTON
Attorney General

TAXES: 1) The County Collector is empowered under Section 140.150, et seq., RSMo 1949, (Jones-Munger Act) to sell a leasehold interest in land and a building located thereon, assessed separately from the fee and against the lessee; 2) The conveyance authorized by Section 140.420, RSMo 1949, should be in the usual form describing the lessee's interest in the land and the building; 3) It would not be proper to assess said leasehold and building to the owner of the fee and the lessee jointly.



July 26, 1954

Honorable H. K. Stumberg
Prosecuting Attorney
St. Charles County
St. Charles, Missouri

Dear Mr. Stumberg:

We render herewith our opinion based upon your request of November 16, 1953, which request reads as follows:

"In St. Charles County, there is a number of Club Houses owned by individuals and placed on lease or rented ground. In most cases the cost of construction has been borne by the lessee. For a number of years these club houses have been assessed against the lessee, owner of the building and have been carried in real estate tax books in this County. The County Collector has asked me to obtain your opinion on the following questions:

"Is the County Collector empowered to sell the improvements or lease land under the Jones-Munger Act? If so, what kind of Deed does he give Certificate of purchaser after two years? Would it be proper to assess this against the land owner and the lessee jointly?"

We begin by pointing out that it is proper to assess the leasehold interests and the building (owned by the lessee as your request states) as "real estate" and to the lessee. This practice is sanctioned by State of Missouri ex rel. vs. Mission Free School, 62 S.W. 998, 162 Mo. 332. In that case

Hon. H. K. Stumberg

one Thompson had leased certain real estate from the Mission Free School and had erected thereon a building. The lease provided that said building should remain the property of Thompson, the lessee. The Court said at Missouri loc. cit. 337:

"* * * All property except such as is specifically exempted by the Constitution and the statute made in pursuance thereof, is subject to taxation, and we can see no difficulty in assessing the separate and distinct property of Thompson in this building any more than would be encountered in assessing the property of any other individual. Whether it is real or personal property, or whether the State is bound to regard it as personalty, is not now the question. The point is, is it separately liable to taxation as his property? We hold that it is, And it is Thompson's duty to list it just as every other taxpayer is required to list his property or suffer the penalties. The point may be new in this court, but has often been solved in other jurisdictions. (People ex rel. Muller v. Board of Assessors, 93 New York, 308; People ex rel. v. Commrs. of Taxes, 82 N.Y. 459; Russell v. City of New Haven, 51 Conn. 259; Smith v. Mayer, 68 N. Y. 552.)

"In most States the interest of Thompson under a lease like this is real estate, and as our statute provides that the words 'real estate' shall be construed to include all interest and estate in lands, tenements, and hereditaments (sections 4917 and 4916, Revised Statutes 1889), little doubt can exist that Thompson's interest in this realty and building should be assessed as real estate. * * *."

You ask then whether the Collector can sell the improvements and leasehold interest under Section 140.150, et

Hon. H. K. Stumberg

seq., RSMo 1949, popularly known as the Jones-Munger Act. Our opinion is that he can. Said Section 140.150, subsection 1, reads thus:

"1. All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this chapter on the fourth Monday in August of each year."

The term "land and lots" we take to have the same meaning as "real estate" under Section 137.010, subsection 2, RSMo 1949, and to include a leasehold interest and building such as we are here considering. *State vs. Mission Free School, supra.*

You ask what kind of deed the Collector gives the purchaser after the redemption period? Section 140.420, subsection 1, RSMo 1949, provides that the Collector "shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, * * *". *which*

The conveyance would be in the usual form describing the interests of the lessee -- a leasehold interest, and the building located thereon.

Although the statute says that the conveyance shall vest in the grantee "an absolute estate in fee simple" subject to certain claims, this does not mean that the grantee in all cases receives an estate of inheritance; the term "fee simple" is not used here in its technical sense. It evidently means only that the tax deed cuts out all encumbrances junior to the lien for taxes for which the property was sold. If "fee simple" were used in its technical sense it would mean that a life estate or a leasehold interest could not be assessed and sold separately from the reversionary interest; and it has been recognized by many Missouri cases that they can be so separated for tax purposes. *Duffey vs. McCaskey, et al., 134 S.W. (2d) 62, 65 (14); Bradley vs. Goff, 243 Mo. 95, 147 S.W. 1012*, both cases involving life estates; *State vs. Mission Free School, supra.*

You then ask whether it would be proper to assess "this" (presumably the leasehold and buildings) against the lessee and owner of the fee jointly? We think not. Lands are to be assessed in the name of the owner if known. Section 137.215,

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subsection 1, RSMo 1949. The owner of the fee is not the owner of the leasehold or of the building. As the Court said in State ex rel. vs. Mission Free School, supra, at Missouri loc. cit. 336:

"As there was no assessment of Thompson's building by the assessor, and as his ownership is distinct from that of the Mission Free School, the assessment of his building as a part of the school's lot was clearly erroneous, as the law requires all property in this State to be assessed to the owner if known, and this lease was open to the assessor. As said on the former appeal, Thompson is not to be subjected to the tax on the ground, nor the school, even if not wholly exempt, to pay the tax on his building. * * *."

Also, in State vs. Convention Hall Association, 301 Mo. 663, 257 S.W. 113, the Court said, Missouri loc. cit. 674:

"As said in the foregoing case the assessment and levy of taxes is purely statutory, and the statutes require lands and real estate to be assessed in the name of the owner thereof. The fee to both lot and building was in the city of Springfield. The property itself should have been assessed (if subject to assessment and taxation) to the owner, the city of Springfield. The leasehold estate (if subject to assessment and taxation at all) should have been assessed to defendant, unless the terms of the lease precludes this view. The assessment here is not upon the leasehold and hence not upon anything owned by the defendant. This suffices for an affirmance of the judgment."

CONCLUSION

1) The County Collector is empowered under Section 140.150, et seq., RSMo 1949, (Jones-Munger Act) to sell a

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leasehold interest in land and a building located thereon, assessed separately from the fee and against the lessee; 2) The conveyance authorized by Section 140.420, RSMo 1949, should be in the usual form describing the lessee's interest in the land and the building; 3) It would not be proper to assess said leasehold and building to the owner of the fee and the lessee jointly.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Very truly yours

JOHN M. DALTON
Attorney General

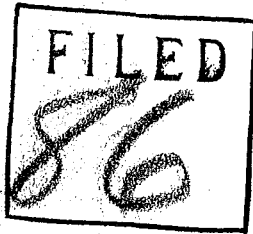
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SCHOOLS:

SCHOOL DISTRICTS:

SCHOOL FUNDS:

Funds derived from school lunch program and from school athletic and dramatic funds are school district monies which must be disbursed in accordance with Sec. 165.110, MoRS, Cum. Supp., 1953. If school board uses district funds in purchasing sale of candy and soda, such funds must also be disbursed in the same manner.



September 29, 1954

Honorable H. K. Stumberg
Prosecuting Attorney
St. Charles County
St. Charles, Missouri

Dear Mr. Stumberg:

This is in response to your request for opinion dated August 28, 1954, which reads, in part, as follows:

"In this connection will you please render your official opinion as to whether monies received from school lunch programs, school athletic and dramatic activities, and the sale of candy and soda by the school and which are deposited in the bank as 'Wentzville High School Fund', are monies belonging to the ~~School District~~ and monies which must be disbursed in accordance with Section 165.110 Missouri Revised Statutes 1949."

As a basic premise for the answer to your inquiry, we call attention to that portion of Section 165.110, MoRS, Cum. Supp., 1953, which provides that: "All school moneys received by a school district shall be disbursed only for the purposes for which they were levied, collected or received." That section further provides that: "School district moneys shall be disbursed only through warrants drawn by order of the board of education," and specifies the manner in which such warrants shall be drawn. Therefore, the only real question is whether these particular funds are "school district moneys."

As a general proposition, we believe it safe to say that revenue received by the district, whether derived from taxation, donation, state aid, or as the result of some school activity which is an incidental part of the administration and government of the schools of the district, is properly classified as "school district moneys." In other words, funds which are received or should be received by the school district in its capacity as such must be funded and disbursed in accordance with Section 165.110, supra.

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In connection with the first item mentioned, i. e., monies derived from the school lunch program, we call attention to Section 165.103, RSMo 1949, which authorized the board to provide for the sale of lunches to children. That section reads as follows:

"The board of directors, or board of education, shall have the power, in its discretion, to install in the school buildings under its care, the necessary apparatus and appliances, and to purchase the necessary food to enable it to provide and sell lunches to children attending the schools; provided, however, that such lunches shall not be so sold for a less price than the cost of the food, exclusive of the cost of the necessary apparatus and appliances and exclusive of costs necessary and incidental to the purchase of the food and the preparing and serving of the lunches; provided further, that in cities now having, or which may hereafter have five hundred thousand inhabitants, any surplus fund heretofore or hereafter derived from the sale of such lunches may, in the discretion of the board of education of said city, be used to furnish lunches at less than cost to such public school pupils of compulsory school age as would otherwise be unable by reason of insufficient nutrition, to attend school and to pursue the courses of study prescribed."

There is no express statutory direction as to the fund into which the proceeds derived from the sale of school lunches shall be placed. However, Section 165.110, supra, creates only the following funds: "Teachers' Fund, Incidental Fund, Free Textbook Fund, Building Fund, Sinking Fund and Interest Fund." It has been held by this office in an opinion rendered to Honorable Charles A. Lee under date of January 11, 1935, copy enclosed, that "Since the statute has prescribed the funds which may be set up on the books of the district or its treasurer, it necessarily follows that the school board or treasurer thereof has no legal authority to set up a fund for a purpose not named in any statute."

Section 165.110, supra, makes further directions as to the funds into which revenue derived from certain specified sources shall be placed. It then provides that: "Money received from

Hon. H. K. Stumberg

any other source whatsoever shall be placed to the credit of the fund or funds designated by the board." In other words, if the statutes do not provide into what fund certain revenue shall be placed, the fund into which it shall be placed is left to the discretion of the board, but the board is limited to one of the funds created by Section 165.110, supra.

Since the school lunch program is conducted by the school board and in so doing the board is performing a governmental function (Krueger v. Board of Education of St. Louis, 310 Mo. 239, 274 S. W. 811), we believe it is clear that the money derived from and used in the conduct of that program belongs to the school district and must be disbursed as provided in Section 165.110, supra.

Your next inquiry involves funds derived from school athletic and dramatic activities. With regard to such activities, this office held in an opinion directed to Honorable W. H. Pinnell on September 10, 1951, copy enclosed, that "school sponsored athletic events, school plays and entertainments, are 'educational functions and activities'" so as to fall within the exemption clause of the Sales Tax law. From the cases cited in that opinion we take it that athletic and dramatic activities are an integral part of the school curriculum.

Educational activities are a function of the school district, the government and control of which is vested in the board of education (Section 165.317, MoRS, Cum. Supp., 1953). Therefore, we perceive no reason why the funds derived from or expended in the conduct of school sponsored athletic events or dramatic activities which are an incident of the educational program should not be considered the same as other funds of the district and, hence, subject to the control of the board. Being district funds, they can be disbursed only as provided in Section 165.110, supra.

You next refer to "the sale of candy and soda by the school." If the word "school" as used in your letter refers to the school district, and if you mean that the board of education furnishes district funds for the operation of this activity or at least furnished the initial capital therefor from district funds and does in fact receive revenue therefrom, whether or not the board has the authority to engage in such activity, such funds should be handled in the same manner as other funds of the district in accordance with Section 165.110, supra.

On the other hand, of course, if the funds for the operation of this activity were and are derived from some source other than district funds and such activity is not conducted by the board, then they are not district funds over which the board would have control and Section 165.110, supra, would not apply.

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CONCLUSION

It is the opinion of this office that funds received from a school lunch program conducted by the board of education of a school district are funds of the district which must be disbursed in accordance with the provisions of Section 165.110, MoRS, Cum. Supp., 1953.

It is the further opinion of this office that revenue derived from school sponsored athletic and dramatic events are also funds of the school district which must be disbursed in accordance with Section 165.110, supra.

If the board of education uses district funds in the purchase and sale of candy and soda, regardless of whether or not the board has the authority to engage in such activity, it is our further opinion that such funds must be disbursed by the board in accordance with Section 165.110, supra.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

Enclosures (2)

1-11-35 to Hon. Charles A. Lee
9-10-51 to Mr. W. H. Pinnell

JWI:ml:da

TAXATION AND REVENUE: Township entitled to taxes derived from
TOWNSHIPS: imposition of township levy on real and
personal property located therein accord-
ing to general law.



October 29, 1954

Honorable Christian F. Stipp
Representative, Carroll County
Carrollton, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"Carroll County operates under the township
organization law. Carrollton Township has
been duly named and described by the county
court and consists of Township 53N of Range
23W. Wakenda Township has been duly named
and described by the county court and con-
sists of Township 52N of Range 23W.

"The Town of Carrollton is located partly
in Carrollton Township and partly in Wakenda
Township with the greater part (both in area
and population) in Carrollton Township.

"For many years the property located in that
part of the Town of Carrollton which lies in
Wakenda Township has been assessed by the
Carrollton Township assessor and taxes as-
sessed and levied against said property have
been collected by the Carrollton Township
Collector. In other words, we have always
proceeded in tax matters as if the entire
Town of Carrollton was in Carrollton Town-
ship.

"Please advise me whether or not the taxes
levied for township purposes against property
located within the Town of Carrollton and in
Wakenda Township should go to Carrollton
Township or Wakenda Township.

"It is rather important that I have your
opinion as soon as possible."

Honorable Christian F. Stipp

Your attention is first directed to the provisions of Section 137.440, RSMo 1949, relating to the making of assessments in counties under township organization, which reads as follows:

"The assessor or some suitable person empowered by him, shall, within the time prescribed by law, and after being furnished with the necessary blanks proceed to take a list of the taxable property of his township and assess the value thereof in accordance with the provisions of the general laws of this state in relation to the assessment of real and tangible personal property by county assessors, in all things pertaining to the discharging of his official duties, except when the same may be inconsistent with the provisions of this chapter; provided, that in counties under township organization the assessor shall not be required to give bond and his compensation shall be such as is provided in section 65.240, RSMo 1949 for his services."

Your attention is further directed to the provisions of Section 137.435, RSMo 1949, reading as follows:

"All real property shall be assessed in the township in which the same is situated, with the owner's name thereof, if known; if the owner's name is not known, then it shall be assessed as nonresident."

We will not undertake to point out the various statutes relating to the tax situs of tangible personal property, inasmuch as such situs is affected by the ownership of such property. Suffice it to say that in each instance the tax situs will be determined according to the general laws relating to the assessment of property of this type. As bearing upon this question, and in the belief that they might be helpful to you, we attach hereto copies of official opinions previously delivered under dates of March 10, 1950 and July 28, 1954, to W. V. Mayse, Prosecuting Attorney, Harrison County, and John R. Caslavka, Prosecuting Attorney, Dade County, respectively.

The foregoing clearly indicates that in each township all real property located within the boundaries thereof, together

Honorable Christian F. Stipp

with such personal property as may have acquired a tax situs therein, is to be assessed for township purposes by the township assessor. Subsequently taxes derived from such assessments are to be paid into the proper funds of such township. The mere fact that a city, town or village may lie partly in one township and partly in another does not interfere with the assessment of such portion of the real property embraced in such city as is located within a particular township. Similarly, if tangible personal property has its tax situs within such township, then it is properly assessable therein.

CONCLUSION

In the premises, we are of the opinion that real property forming a part of a city lying in two separate townships is to be assessed for township purposes within the township where actually located.

We are further of the opinion that all tangible personal property having its tax situs within such township is to be similarly assessed.

We are further of the opinion that taxes derived from levies imposed upon the valuations of such property are to be collected by the township collector of the township wherein such real and tangible personal property is assessed and the proceeds of such collections credited to the benefit of such township.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

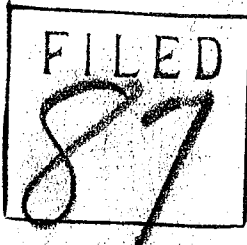
Respectfully submitted,

John M. Dalton
Attorney General

WFB/vtl

Enclosures: 3-10-50 W.V. Hayse
7-28-54 John R. Caslavka

CIRCUIT COURTS: Section 540.020 RSMo 1949, providing that grand
GRAND JURIES: jury be convened upon order of judge of court
WHEN CONVENED: of record having jurisdiction of felonies is
directory rather than mandatory. Does not re-
quire grand jury convened at least once during certain period
of time. Calling of grand jury discretionary with judge, who
may order same convened at such times as he deems necessary.



March 4, 1954

Honorable George T. Sweitzer, Jr.
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

This department is in receipt of your recent request for
an opinion which reads in part as follows:

"Is it or is it not by law mandatory or
even obligatory that the Judge of a Cir-
cuit Court in any County of this State
call a Grand Jury in such County at least
once during any specified length of time."

There are a number of Missouri statutes specifically pro-
viding the procedure that shall be followed in convening a
grand jury in counties or cities of a certain population. The
question propounded in the opinion request is not concerned with
such procedure as it pertains to counties or cities of a certain
population, but it is concerned with the proposition as to whether
it is the mandatory duty or even obligatory upon the Circuit Judge
to call a grand jury in "any county of this State" at least once
during a specified period of time.

As we construe the inquiry, and particularly the words "any
county of this State", such inquiry has reference to the proce-
dure for convening a grand jury in every county of the state.
If we were to attempt to answer the inquiry in its present form,
this would necessitate the writing of an opinion in regard to the
procedure for convening a grand jury as it applies to the 114
counties of Missouri and the City of St. Louis.

Neither time nor space will permit us to write such a general
opinion, and it is believed that you did not intend to request one

Hon. George T. Sweitzer, Jr.

of this kind, since the duties of your office as prosecuting attorney would relate only to your dealings with grand juries in Cass County, and you would have no legal right or authority or duties to perform with reference to grand juries in any other counties of the state. Therefore the scope of our discussion of the matter of inquiry will be limited to such matter only as it concerns Cass or other counties of the same or similar population.

From the last federal census report, your county of Cass had a population of 19,325. Upon our examination of the Missouri Revised Statutes of 1949, it appears that there are no sections of said statutes specifically relating to the procedure for calling grand juries applicable to counties or cities having a population as small as Cass County. Consequently, the procedure to be followed in the smaller counties is that provided generally by Section 540.020 RSMo 1949. Said section reads as follows:

"1. No grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies, but when so assembled such grand jury shall have the power to investigate and return indictments for all grades of crimes, and hereafter, whenever the judge of any court having power to try and determine felonies shall deem it necessary to cause a grand jury to be convened, he shall make an order, and if in vacation file the same with the clerk of said court and in term time he shall cause the same to be spread upon the records of said court, which order shall specify the time and place said grand jury shall be convened, and shall further specify whether said grand jury shall be drawn and selected by the board of jury commissioners or selected by the sheriff, and if said order shall require that said grand jury be drawn and selected by the board of jury commissioners, the clerk of said board of jury commissioners shall cause said board of jury commissioners to be convened and said board of jury commissioners shall thereupon draw and select said grand jury and the same shall be summoned in the same manner as provided by law for the selection and summoning of petit jurors. And if the said order

Hon. George T. Sweitzer, Jr.

shall require the sheriff of said county to select said grand jury, the clerk shall issue a special venire and deliver the same to the sheriff and he shall forthwith proceed to select the same, selecting them as nearly equal from each township in said county as possible."

"2. A grand jury shall be convened at the discretion of a judge of the court having the power to try and determine felonies, to examine public buildings, and report on their conditions; to inquire into violations of the game and fish law, the election laws, the various liquor laws, and such other violations as the court may direct. The grand jury shall make careful inquiry into the failure or refusal of county and municipal officers to do their duty, as provided by law, and the court shall charge each grand jury to make inquiry into any violations by county officers of laws relating to the finances or financial administration of the county."

(Underscoring ours)

From the provisions of this section, it is obvious that a grand jury can be convened only when ordered by a judge of a court of record of the county having power to determine felony cases. In Cass or other similar counties, this reference would necessarily be to the Circuit Judge, as he is the only Judge of a court having jurisdiction of felony cases and would be the only one who could order a grand jury convened.

This section provides, "that whenever the judge having power to determine felonies shall determine it necessary to cause a grand jury to be convened, he shall make an order * * * which shall specify the time and place said grand jury shall be convened * * *. A grand jury shall be convened at the discretion of a judge having power to try and determine felonies * * *".

Neither this nor any other section of the statutes requires the circuit judge in such small counties to call a grand jury at least once during a specified period of time. As we read Section 540.020, supra, it appears to be the legislative intent from the

Hon. George T. Sweitzer, Jr.

language expressed in said section that the convening of a grand jury is left to the sound discretion of the circuit judge who has the power to order a grand jury convened if and when he deems it necessary.

CONCLUSION

It is the opinion of this department that the provisions of Section 540.020 RSMo 1949, which provide that a grand jury shall be convened upon the order of a judge of a court of record of a county, having jurisdiction of felonies, are discretionary rather than mandatory, and do not require said judge to order a grand jury convened at least once during any certain period of time. Such matter being left to the discretion of said judge, he may order a grand jury convened at such times as he deems necessary.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

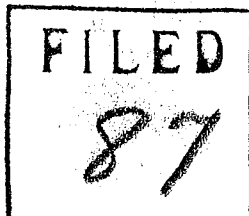
Very truly yours,

JOHN M. DALTON
Attorney General

PNC:sm

COUNTIES: Payment of warrant by county treasurer for
COUNTY COURT: services of an attorney representing in-
COUNTY TREASURER: dividual members of the county court in
contempt proceedings and habeas corpus pro-
ceedings, invalid.

SEE: State ex rel. Lack v. Melton 692 S.W.2d 302 (Mo. banc 1985).



October 13, 1954

Honorable J. O. Swink
Attorney at Law
7 North Jefferson Street
Farmington, Missouri

Dear Judge:

This will acknowledge receipt of your opinion *request* which we shall restate for sake of brevity.

You inquire if payment of the following warrant issued by the County Court of St. Francois County, Missouri, constitutes a valid expenditure of the county. Three members of said county court retained a lawyer to defend them in contempt proceedings in the circuit court of said county and also in habeas corpus proceedings filed by said members in the St. Louis Court of Appeals. Said warrant was issued in the amount of \$600 to said attorney for such services rendered and the county treasurer paid same.

In proceedings in the circuit court said members of the county court were found guilty and committed to jail, whereupon the St. Louis Court of Appeals in the habeas corpus proceedings released them. The proceeding in the St. Louis Court of Appeals is reported in the case of Pogue et al., v. Swallen, 238 S.W. (2d) 20. The contempt proceeding in the circuit court was filed for alleged failure of three members of said county court to pay additional salary of a deputy of the circuit clerk as authorized and ordered by the circuit court. The decision in Pogue, et al., v. Swallen, supra, merely held that the order of the circuit court authorizing a raise in salary of the deputy circuit clerk was valid; however, payment of same could only be enforced by proper remedy and not by contempt proceedings.

County courts are merely agents of the county and under the Constitution of the State of Missouri such courts are not longer

Honorable J. O. Swink

"Courts" in a judicial sense, but are ministerial bodies managing the counties' business, with certain taxing and administrative power. Outside of the management of fiscal affairs of the county such county courts possess no powers except those conferred by statute. State ex rel Floyd v. Philpott, 266 S.W. (2d) 704.

It is well established that a public official holds his office cum onere with all responsibilities attached thereto. State on inf. of McKittrick v. Williams, 144 S.W. (2d) 98, 346 Mo. 1003. Furthermore, the courts have held that officers are creatures of law and agents with limited authority and are trustees of public money. Lamar Twp. v. City of Lamar, 169 S.W. 12, 261 Mo. 171.

There is no statute specifically authorizing the individual members of the county court to retain counsel for the purpose of defending them under the facts stated herein at expense of the county. In this instance the St. Louis Court of Appeals held for the members of the county court, however, said opinion was premised on the improper procedure instituted therein and not on the fact that said members could ignore the orders of the circuit court authorizing said increase of salary. It further held that the order of the circuit court was valid. While under certain circumstances this may be a harsh rule to require county officers when found to be properly administering the law to incur the additional expense of retaining counsel to defend them, that is just one of the things that go with the office and in the absence of a statute authorizing such expenditure it must be paid by the county officers.

There are statutes authorizing the retention of special counsel by the county or county officials for certain specified purposes. In such instances it naturally follows that such expenditures are legitimate and the appellate courts have so held.

Section 56.250, Revised Statutes of Missouri 1949, vests in county courts of third and fourth class authority to employ special counsel in said instances and reads:

"The county courts of all counties in this state of the third and fourth classes may, in their discretion, employ special counsel or an attorney to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties, and may pay to such special counsel or attorney reasonable compensation for

Honorable J. O. Swink

their services, such compensation to be fixed by the county court of such county, to be paid out of such funds as the county court may direct; and such counsel or attorney shall be a person learned in the law, and at least twenty-five years of age."

The foregoing statute authorizes the employment of special counsel to represent the county either in the prosecution of or defending any suit by or against the county. Under the facts stated herein we believe Section 56.250 supra, gives no authority to the members of the county court to employ special counsel in this instance, for the reason that he is not being employed to represent the county but individual members of the court.

This department long ago under date of July 8, 1938 rendered an opinion to the Prosecuting Attorney of Morgan County, Honorable G. Logan Marr, a copy of which we are attaching hereto, wherein it was held that the county court was not authorized to pay attorney fees for defending the county collector in a civil suit charging official wrong doing of the collector.

The decision in the above referred to litigation in no manner changes the liability for said counsel's fee. In other words, liability does not hinge upon whether the court sustains said officer's contention or rejects it. There just simply is no authority for paying same.

CONCLUSION

Therefore, it is the opinion of this department that the payment of said warrant was unauthorized and same may be recovered under the law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

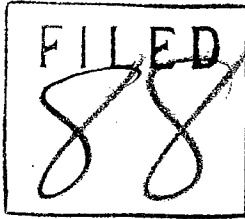
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Enc. Opn. to Hon. G. Logan Marr

7-8-38

CORONERS:

- (1) Coroner in City of St. Louis as such has no authority to order the arrest or detention of persons suspected of complicity in crime causing death by violence or of a material witness thereto, prior to the holding of inquest.



January 28, 1954

Honorable Patrick E. Taylor
Coroner, City of St. Louis
1300 Clark Avenue
St. Louis, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows;

"Customarily in the past years in our relationship with the Police Department it has been the practice that the Police Department would hold a supposed defendant in custody or permit them to make bond with our O.K. pending the outcome of the Coroner's Inquest.

"Secondly, material witnesses would be held for us or only given a bond on the Coroner's approval pending a Coroner's Inquest.

* * *

"I might remark at this time that due to the fact that we handled over 2600 cases in 1952 and 2514 cases in 1953, it is sometimes impossible for us to have our inquests immediately. It sometimes takes two or three days before we are able to hold the inquest.

Honorable Patrick E. Taylor

"Hoping that you or your office are able to give us an opinion on this in the very near future, I remain
* * *"

The first two paragraphs of your letter of inquiry indicate that in the past the coroner for the City of St. Louis has notified the police department of that city of persons suspected of complicity in crimes of violence and thereupon the police department would detain such person or persons or admit them to bail upon the approval of the coroner. It further appears that material witnesses would also be detained by such police department or would be released only upon giving a bond, subject to the approval of the coroner.

It further appears that such procedure would be followed prior to the holding of the formal inquest by the coroner.

We have carefully examined the provisions of Chapter 58, RSMo 1949, and we do not find that such authorization has been granted to the coroner of the City of St. Louis. Power has been granted to that officer to issue subpoenas for persons to attend inquests to be held to inquire into deaths thought to have occurred from violence. This authorization appears in Section 58.330, RSMo 1949. Coroners are further authorized under Section 58.350 to require material witnesses to enter into recognizance for their appearance before the Court having criminal jurisdiction of the county wherein the felony appears to have been committed. Coroner has further power under Section 58.380 to issue a writ of attachment for the bringing in of any witness, who shall have failed without just cause to attend an inquest after having been duly subpoenaed, if it appears that the testimony of such witness is material.

One further duty has been imposed upon the coroner under the provisions of Section 58.370, which reads as follows:

"The coroner, upon an inquisition found before him of the death of any person by the felony of another, shall speedily inform one or more magistrates of the proper county, or some judge or justice of some court of record, and it shall be the duty of such officer forthwith to issue his process for the apprehension and securing for trial of such person."

Honorable Patrick E. Taylor

From the foregoing it appears that the duty of making arrests of persons suspected of complicity in felonies relating to deaths by violence remains with those enforcement officials who customarily are chargeable with the discharge of such duties. It also appears that it is only after the materiality of a particular witness' testimony appears at a formal inquest that any authorization has been granted to any coroner to require such witness to enter into a recognizance for his further appearance at criminal proceedings arising out of the death by violence. In the absence of statutory duties with respect to these matters having been enjoined upon the coroner for the City of St. Louis it is our belief that no such duty devolves upon that officer and that in ordering the arrest and detention of persons suspected of complicity in death thought to have occurred by violence or the arrest and detention of a witness whose testimony is thought to be material to an inquest into such death to be held subsequently, the coroner for the City of St. Louis exceeds his authority.

Of course, it is not meant to infer in this opinion that the proper officers are required to delay the arrest and detention of persons suspected of complicity in such crimes. However, such arrests may be made only in accordance with the legal standards prescribed therefor.

CONCLUSION

In the premises, we are of the opinion that the coroner of the City of St. Louis does not have the authority to order the arrest and detention, pending an inquest, of persons suspected of complicity in a death thought to have occurred by violence, nor of witnesses whose testimony is thought to be material to such inquest.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

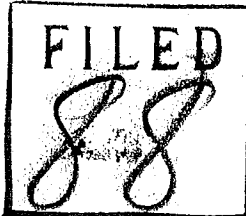
Yours very truly,

JOHN M. DALTON
Attorney General

WFB:vlw

CORONERS:
DEAD BODIES:
ANATOMICAL BOARD:

Specimens of human bodies collected by previous coroners of the City of St. Louis should be disposed of in accordance with the provisions of Chapter 194.120, et seq., RSMo 1949.



February 2, 1954

Honorable Patrick H. Taylor
Coroner of the City of St. Louis
1300 Clark Avenue
St. Louis, Missouri

Dear Sir:

By letter dated January 13th, 1954, you requested an official opinion of this department, as follows:

"Enclosed please find copy of letter received by me from Dr. H. C. Harring, President of the Missouri Chiropractic College.

"Over a period of years the previous Coroners have collected some specimens which were used for display purposes. Since I have been Coroner, I have eliminated this practice, but I find myself with these specimens on my hands. The Missouri Chiropractic College has requested them to use and later dispose of.

"I am writing to you for an opinion as to whether I have the authority to give them to this college."

In a subsequent letter you stated:

Honorable Patrick E. Taylor

"* * * please be advised that these specimens consist of lungs, hearts, calculi, carcinomas, etc. from various bodies that showed pathology.
* * *"

The Legislature of Missouri has provided for the disposition of certain unclaimed human bodies by Chapter 194, RSMo 1949. Section 194.120 provides for the formation of the Missouri State Anatomical Board as follows:

"1. That the heads of departments of anatomy, professors and associate professors of anatomy at the educational institutions of the state of Missouri which are now or may hereafter become incorporated, and in which said educational institutions human anatomy is investigated or taught to students in attendance at said educational institutions, shall be and hereby are constituted the Missouri State Anatomical Board, herein referred to in sections 194.120 to 194.180 as 'the board.'

"2. The board shall have exclusive charge and control of the disposal and delivery of dead human bodies, as described in sections 194.120 to 194.180, to and among such educational institutions as under the provisions of said sections are entitled thereto.

"3. The secretary of the board shall keep an accurate record of all bodies received and distributed by the board, showing the dates of receipt and distribution, the sources from which they came to the board, and the name and address of the educational institutions to which the same were sent, which record shall be at all times open to the inspection of each member of the board and of any prosecuting attorney or circuit attorney of any county or city within the state of Missouri."

Honorable Patrick E. Taylor

Section 194.140, Paragraph 2, requires the giving of a bond by any educational institution receiving bodies under this chapter, as follows:

"2. No educational institution shall be allowed or permitted to receive any body or bodies in the manner provided for by sections 194.120 to 194.180 until a bond, approved as to form by the attorney general of this state, shall have been given to the board by or in behalf of such educational institution, which bond shall be in the penal sum of one thousand dollars, conditioned that all such bodies which the said educational institution shall receive thereafter in the manner provided by said sections, shall be used only for the promotion or application of anatomical knowledge and science; and whosoever shall sell or buy such body or bodies, or part or parts of body or bodies, or in any way traffic in the same, or shall transmit or convey or cause to be transmitted or conveyed such body or bodies, or part or parts of such body or bodies, to any place outside of this state, shall be deemed guilty of a misdemeanor and shall, upon conviction, be subject to a fine not exceeding two hundred dollars or be imprisoned for a term not exceeding one year, or both; but this section shall not be construed as prohibiting any physician or dentist licensed to practice his profession in this state, or teachers or investigators of anatomy in said institutions, from transporting human specimens outside of the state for temporary use at scientific meetings or exhibits."

Section 194.150 requires the coroner, among other persons, to notify the Secretary of the Anatomical Board, or other person designated by said board, whenever any body is in said coroner's hands, which is subject to the provisions of Chapter 194.

Honorable Patrick E. Taylor

"1. Superintendents or wardens of penitentiaries, houses of correction and bridewells, hospitals, insane asylums and poor houses, and coroners, sheriffs, jailers, city and county undertakers, and all other state, county, town or city officers having the custody of the body of any deceased person required to be buried at public expense, shall be and hereby are required immediately to notify the secretary of the board, or the person duly designated by the board or by its secretary to receive such notice, whenever any such body or bodies come into his or their custody, charge or control, and shall, without fee or reward, deliver, within a period not to exceed thirty-six hours after death, except in cases within the jurisdiction of a coroner where retention for a longer time may be necessary, such body or bodies into the custody of the board and permit the board or its agent or agents to take and remove all such bodies, or otherwise dispose of them; provided, that each educational institution receiving a body from the board shall hold such body for at least thirty days, during which time any relative or friend of any such deceased person or persons shall have the right to take and receive the dead body from the possession of any person in whose charge or custody it may be found, for the purpose of interment, upon paying the expense of such interment. * * *" (Emphasis ours).

The specimens which you have on hand are not complete human bodies, but instead are organs or other portions of the human body, which have become severed from the main part of the body. The question is thus raised whether the provisions of Sections 194.120, et seq., are applicable to these severed portions of the human body. It was the apparent intent of the Legislature, in enacting Sections 194.120, et seq., to provide a method for disposition of certain bodies which are unclaimed and which would otherwise require disposition at public expense. And, further, that such bodies be given to further the study of the human body and its infirmities by educational institutions of this state wherein human anatomy is investigated or taught. It

Honorable Patrick E. Taylor

is our opinion that since the same problem is raised as to the disposition of severed parts of a human body, as is raised in the disposition of the entire human body, and that the same beneficent purpose would be served, it must be concluded that the provisions of Sections 194.120 et seq., were intended by the Legislature to be applicable to the disposition of unclaimed portions of a human body which have become severed from the main part of the body.

According to the Office of the Secretary of State, the present Secretary of the Anatomical Board is: Hon. M. D. Overholser, c/o University of Missouri, Columbia, Missouri.

CONCLUSION

It is, therefore, the opinion of this office that specimens of human bodies collected by previous coroners of the City of St. Louis should be disposed of by the Missouri State Anatomical Board, in accordance with the provisions of Sections 194.120, et seq., RSMo 1949.

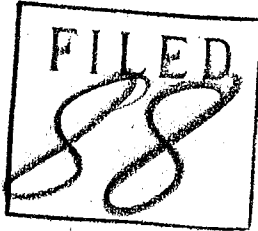
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:vlw

SHERIFFS: Mileage to be allowed sheriff of Jasper County for transportation of prisoners between Joplin and Carthage.



November 5, 1954

Hon. Stewart E. Tatum
Prosecuting Attorney
Jasper County
Carthage, Missouri

Attention: R. A. Esterly, Assistant Prosecuting Attorney

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"A question has arisen between the Sheriff's office here in Jasper County and the Jasper County Court concerning the mileage allowance to the Sheriff. In submitting his monthly report, the Sheriff is seeking to claim mileage for each prisoner transported between Joplin and Carthage in cases where more than one prisoner is transported in the same vehicle. The County Court takes the position that the Sheriff should only be allowed mileage for the actual miles travelled insofar as his reimbursement from the County is concerned.

"Would you please give us your opinion upon this question."

Your attention is first directed to the following portion of Section 57.290, RSMo 1949, Cum. Supp. 1953, reading as follows:

"4. * * * No compensation shall be allowed under this section for taking the prisoner or prisoners from one place to another in the same county, excepting in counties which have two or more courts with general criminal jurisdiction. In such counties the sheriff shall have the same fees for conveying prisoners from the jail to place of trial

Hon. Stewart E. Tatum

as are allowed for conveying prisoners in like cases from one county to another, * * *; provided, that the court is held at a place more than five miles from the jail; and no court shall allow the expense of a guard, although it may have actually been incurred, unless from the evidence of disinterested persons it shall be satisfied that a guard was necessary; * * *.

"5. These costs shall be taxed as other costs in criminal procedure immediately after conviction of any defendant in any criminal procedure. The clerk shall tax all the costs in the case against such defendant and deliver a certified copy of the same to the sheriff, who shall immediately proceed to collect such costs from the defendant, together with ten per cent on the amount of costs, so collected, as a commission for collecting the same, and the clerk shall receive of such commission an amount equal to ten per cent of the fees collected and due such clerk, and the remainder of such commission shall be retained by the sheriff; provided, that in no case shall such commission be taxed against or paid either by the county or the state; * * *."

It appears that Jasper County falls within the exception mentioned in the statute, inasmuch as under the provisions of Section 478.527, RSMo 1949, two separate courts of general criminal jurisdiction have been established in such county, and from the further fact that according to the mileage chart prepared by the Missouri State Highway Commission, the distance between the cities of Carthage and Joplin is 16 miles. It therefore becomes necessary to ascertain the fees allowed sheriffs for conveying prisoners from one county to another as mentioned in the statute.

Such fees are provided under other provisions of the same statute mentioned, and appear in the following language:

"4. The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense

Hon. Stewart E. Tatum

was committed, or who may remove a prisoner from one county to another for any cause authorized by law, * * * shall be allowed by the court, having cognizance of the offense, one dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one, and seven cents per mile for every mile necessarily traveled in going to and returning from one county to another, and the guard employed, who shall in no event exceed the number allowed the sheriff, marshal or other officer in transporting convicts to the penitentiary, shall be allowed the same compensation as the officer. * * *."

In view of the short distance to be traveled between the cities of Carthage and Joplin, it appears that normally no allowance will be made the sheriff except the mileage.

It has been the well-established public policy of the State of Missouri to allow officers charged with travel, including the service of process and other legal papers, and the conveying of prisoners to and from trial, or to the penitentiary, mileage based only upon necessary travel. For instance, Section 57.290, RSMo 1949, prohibits sheriffs from splitting up loads of persons sentenced to the penitentiary and requires that except in unusual circumstances all of such prisoners convicted at the same term shall be taken in one group. Section 57.280, RSMo 1949, providing for the fees of sheriffs in civil cases, allows mileage which is restricted only to one trip when more than one witness is summoned or other papers are served in the same cause on the same trip. The same is true of mileage allowed under Section 57.300, RSMo 1949, where in the service of summonses, subpoenas, etc., in criminal cases the same limitation applies. In class two counties, to which Section 57.350, RSMo 1949, is particularly applicable, we find the same limitation.

The foregoing statutes and others indicate that the General Assembly has never contemplated that a sheriff might receive mileage to be taxed as costs in several cases when he in fact performs but one service. This, we believe, is bottomed upon the principle that mileage is not meant as "compensation," but rather is in the nature of "reimbursement" to the officer for actual expenses necessarily incurred in the discharge of his official duties. In the circumstances which you have outlined,

Hon. Stewart E. Tatum

the sheriff does not incur more necessary expenses in transporting more than one prisoner between Carthage and Joplin, or vice versa, than he incurs if he transports but one prisoner. Therefore, keeping in mind the purpose for which mileage is allowed and the expressed public policy of the State of Missouri in this regard, we reach the conclusion that the sheriff may collect mileage based only upon actual miles traveled without regard to the number of prisoners actually transported.

CONCLUSION

In the premises, we are of the opinion that the sheriff of Jasper County is entitled to be reimbursed for mileage in transporting prisoners for trial or for commitment between Carthage and Joplin, or vice versa, only upon the basis of miles actually traveled, and that without regard to the number of prisoners actually transported in one trip.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

SCHOOL DISTRICTS: : Tangible personal property of manufacturing
TAXATION: : corporations subject to taxation, should
MANUFACTURER'S TAX: : be assessed in the school district in
PERSONAL PROPERTY TAX: : which the property is located.
.....

December 28, 1954



Honorable Stewart E. Tatum
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Mr. Tatum:

You have requested this office to render an opinion on the following question raised by the Assessor of your county:

"May a manufacturer be assessed in two school districts in a case where its office and operations are located in two districts?

"To be more specific, I refer to the manufacturer's tax of the Hercules Powder Company. Their office and all raw materials are located in one school district. A short distance to the south, and across a school district line, is their plant where all their manufacturing of powder etc. is done and where all magazines are located for storage of their products, when finished. I am enclosing the regular assessment blank for manufacturers in order that you may see the required break-down in the assessment figures.

"Must the assessment be made and the tax paid in the school district where the principal office is located or may it be divided as set out above?"

Section 150.320 (all statutory citations herein are RSMo 1949) requires the County Assessor to enter in a book kept for that purpose, the valuation of property, subject to manufacturer's tax, located in each school district in the county.

Honorable Stewart E. Tatum;

The question arises as to the situs, for taxation purposes, of tangible personal property subject to manufacturer's tax.

Section 137.090 provides that tangible personal property is, generally, taxable in the county where the owner resides. However, Section 137.095 provides that tangible personal property of manufacturing corporations is taxable where located. Section 137.095 reads:

"All tangible personal property of business and manufacturing corporations shall be taxable in the county in which such property may be situated on the first day of January of the year for which such taxes may be assessed, and every business or manufacturing corporation having or owing tangible personal property on the first day of January in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located, shall make return thereof to the assessor of such county or township where situated, in the same manner as other tangible personal property is required by law to be returned."

Section 137.140 provides:

"The real and tangible personal property of all corporations operating in any county in the state of Missouri and in the city of St. Louis, and subject to assessment by county or township assessors, shall be assessed and taxed where situated."

There appears to be no cases determining whether the above statutes require the tangible property of corporations subject to manufacturer's tax to be assessed and taxed in the school district wherein such property is located.

However, in considering Sections 137.090, 137.095 and 137.140 in paria materia, we conclude that it was the intent of the Legislature that tangible personal property subject to manufacturer's tax, should be assessed in the school district where located.

Honorable Stewart E. Tatum:

Section 137.190 merely provides that tangible personal property situate in another county shall be assessed in the county where the owner resides. Yet this has been construed to mean that such property is subject to taxation for school purposes in the school district of the residence of the owner even though such property is located in another school district within the same county. State ex rel. Kelly vs. Shepherd, 218 Mo. 656, 663, 117 S.W. 1169. See also our enclosed opinion to Honorable Dick B. Dale, Jr., Prosecuting Attorney of Ray County, Richmond, Missouri, under date of December 21, 1954. Section 137.195 provides for a different method of determining the situs, for taxation purposes, of tangible personal property of manufacturing corporations. Since Section 137.190 makes the situs of tangible personal property of individuals in the school district in which they live, we conclude that Section 137.190 was intended to place the situs of tangible personal property of manufacturing corporations in the district in which such property is located. Section 137.140 lends weight to that conclusion.

CONCLUSION

It is, therefore, the opinion of this office that the tangible personal property of manufacturing corporations subject to taxation, should be assessed in the school district in which the property is located.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

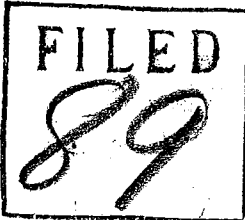
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JOHN M. DALTON
Attorney General

Enc:

INHERITANCE TAXES:
PROBATE COURT TO DETERMINE
WHEN ESTATE SUBJECT TO:

Under Section 145.150, RSMo. 1949, in every instance when administration proceedings are pending in probate court having jurisdiction thereof, immediately upon filing of inventory and appraisalment, if in court's opinion estate is not subject to inheritance tax, it is mandatory duty of court to enter such finding and opinion in the records of said court. If estate appears subject to tax, the court shall set a day for hearing and determination of tax. Before such hearing, the court may, upon its own motion, or that of any interested party, appoint one to appraise estate property, interest therein, or income therefrom, at clear market value subject to tax, and make written report of appraisalment to court. If court finds report correct, then it is mandatory duty of court to make an order approving report and assessing tax at amount shown therein. Said finding and order shall be entered in records of said court.



January 11, 1954

Mr. Donald P. Thomasson
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

This department is in receipt of your recent request for a legal opinion which reads as follows:

"In the matter of inheritance tax, particularly with reference to the provisions of Section 145.150, RSMo. 1949, is it mandatory that the Probate Court make a finding with reference to such tax in every estate that is probated in said court, whether in fact the estate is or is not liable for such a tax?"

Section 145.150, RSMo. 1949, provides what duties are imposed upon the probate court and the procedure that shall be followed by such court in the determination and assessment of state inheritance taxes.

Said section reads, in part, as follows:

"1. The probate court which grants letters testamentary or of administration, either original or ancillary, on the estate of any decedent, shall have jurisdiction to determine the amount of the tax provided for in this chapter and the person, persons, association, institution or corporation liable therefor, and to determine any question which may arise in connection therewith, and to do any act in relation thereto which is authorized by law to be done by such court in other matters or proceedings coming within its jurisdiction.

Mr. Donald P. Thomasson

"2. Such court or the judge thereof in vacation shall immediately upon the filing of the inventory and appraisement of the estate of a decedent, examine the same, and if it is apparent, in the opinion of the said court or judge, that such estate is not subject to the tax provided for in this law, such finding and opinion shall be entered of record in said court, and thereupon the provisions of section 145.210 shall become inoperative as to the holders of funds or other property thereof, and there shall be no further proceedings relating to such tax, unless upon the application of interested parties the existence of other property or an erroneous appraisement be shown.

"3. If it appear that said estate may be subject to such tax, it shall be the duty of the court to set a day for the hearing and determining the amount of said tax and to cause notice thereof to be given in the same time and manner and to the same parties as is herein provided for appraisers, or the court, before determining such matters, may of its own motion, or on the application of any interested person, including the director of revenue, the prosecuting attorney or attorney general, appoint some qualified tax-paying citizen of the county, who is not executor, administrator or beneficially interested in said estate or the attorney for any of such parties, as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax under the provisions of this chapter."

Section 145.150, supra, provides that the probate court which grants letters testamentary or of administration on the estate of any decedent, has jurisdiction to determine the amount of inheritance tax, and those liable for the payment of same, to determine any question arising in connection therewith, also to do any act relating thereto authorized by law and coming within the jurisdiction of that court.

Said section further provides that immediately upon the filing of the inventory and appraisement of a decedent, it shall be the duty of the probate court in which the administration proceedings are pending to examine such inventory and appraisement.

Mr. Donald P. Thomasson

If, after such examination the court is of the opinion that the estate is not subject to inheritance taxes, then the finding and opinion of the court shall be entered of record in said court, and no further proceedings relating to the taxes shall be had, unless upon the application of interested parties the existence of other estate property, or an erroneous appraisement is shown.

If, upon the examination of the inventory and appraisement it appears that the estate may be subject to inheritance taxes, it shall be the duty of the probate court to set a day for hearing and determination of the amount of tax, and to notify all interested parties in the same time and manner as provided for appraisers.

The section further provides that before the determination of the tax liability, and amount due, on the day set for the hearing of such matters the court may, instead of making the determination of the tax liability and assessment of the tax itself, upon its own motion, or upon that of interested parties, including those specifically named in said section, appoint some qualified taxpaying citizen of the county who is not executor, administrator, or is beneficially interested in the estate, or for the attorney of any such parties as appraiser to appraise and fix the clear market value of any estate property or interest therein, or income therefrom, subject to the payment of state inheritance taxes.

Upon the filing of the appraiser's report within the time and manner authorized by Section 145.160, RSMo. 1949, if the court approves such report, then it is the mandatory duty of the court to make an order approving same and assessing the tax at the amount shown in said report, which finding and report shall be entered in the records of said court. The order and judgment of the court as to the tax liability becomes final and the payment of the tax due immediately, subject however, to the filing of exceptions to the appraiser's report within the time provided by Section 145.170, RSMo. 1949.

CONCLUSION

It is the opinion of this department that under the provisions of Section 145.150, RSMo. 1949, in every instance when

Mr. Donald P. Thomasson

administration proceedings are pending in the probate court having jurisdiction thereof, immediately upon the filing of the inventory and appraisal, if after examination of same the court is of the opinion that the estate is not subject to inheritance taxes, then it is the mandatory duty of the court to enter its findings and opinion as a matter of record in said court. If the court is of the opinion that such estate may be subject to the tax, it shall set a day for hearing and determination of the tax, and shall give notice of such hearing within the time and manner prescribed by the statute. That before the date of said hearing the court may, upon its own motion, or that of any interested party, including those specified by the statute, appoint an appraiser to appraise and fix the clear market value of any estate property, interest therein, or income therefrom, subject to the tax, which appraiser shall make a written report of his appraisal to the court as provided by Section 145.160, RSMo. 1949. If the court finds the report to be correct, then it is the mandatory duty of said court to make an order approving same and to assess the tax at the amount shown in said report and to enter its findings and order in the matter in the records of said court.

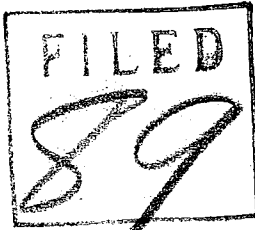
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General

PNC:sm

COUNTY TREASURER:
TOWNSHIP ORGANIZATION:
COUNTIES:
ELECTIONS:



The term of the treasurer of Daviess county will expire on December 31, 1954; that the office may be filled by appointment by the governor at any subsequent time; that the treasurer, whose term expired on December 31, 1954, may hold over in this office until her successor is duly elected or appointed and qualified; that she should not have been a candidate for reelection in 1952 nor in 1954. Further, that she may serve until April 1, 1957, unless her office is filled by appointment by the Governor.

February 18, 1954

Honorable Walter H. Toberman
Secretary of State
Capitol Building
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"Enclosed is a letter from Mrs. Ethel E. Manring, Treasurer of Daviess County, received in this office today.

"Her question is self evident in this letter. However, we would like clarified through an opinion, memorandum or other appropriate method these three questions:

- "1.- Under section 54.030, Revised Statutes of Missouri 1949, should Mrs. Manring have been a candidate for re-election in 1952?
- "2.- If not, does she run for re-election in 1954?
- "3.- If neither is the case, does she serve until April 1, 1957 before relinquishing the office or beginning a new term?

"Although it is not stated in her letter, Mrs. Manring was elected in 1950."

The letter of Mrs. Manring, to which you refer and which you enclose, is noted.

Honorable Walter H. Toberman

On January 5, 1951, this department rendered an official opinion to Honorable C. Bradley Brandom, Prosecuting Attorney of Daviess County, in which opinion we defined the status of the treasurer-elect, who was of course Mrs. Manring. A copy of that opinion is enclosed. In it we held, page 5, paragraph 6, that: "The treasurer elect will assume the duties of his office on the first day of January, 1951, and shall hold this office for a term of four years."

This opinion, as you will note, held that the treasurer-elect would take office January 1, 1951, and would hold office for a term of four years, which would end the term on December 31, 1954.

The question with which we are now confronted is whether the office of county treasurer in your county will become vacant on December 31, 1954. In this regard we direct attention to Section 54.030 RSMo. 1949, which reads:

"In counties of classes three and four the qualified electors shall elect a county treasurer at the general election in the year 1950, and every four years thereafter, except that in those counties having adopted the township alternative form of county government the qualified electors shall elect a county treasurer at the November election in 1948, and every four years thereafter. The county treasurer so elected shall be commissioned by the county court of his county, shall enter upon the discharge of the duties of his office on the first day of January following his election, and shall hold his office for a term of four years and until his successor is elected and qualified unless sooner removed from office. In counties which have adopted the township alternative form of county government the treasurer's term shall extend until the first day of April next after the election of his successor."

It will be noted that the above section holds that in regular organization counties of classes three and four, the county treasurer is to be elected at the January election in 1950, and every four years thereafter. This would put the election of a county treasurer in such counties in the years 1950, 1954, 1958, etc. However, the above section holds that in those counties which have adopted the township alternative form of government, the county treasurer shall be elected at the November election in 1948, and every four years thereafter, which would put such elections in 1948, 1952, 1956, etc.

Honorable Walter H. Toberman

We have held in the above opinion that a county treasurer elected in 1950, in a county which was at that time not under township organization, would hold for four years even though the county changed over to township organization, which your county did on the last Tuesday in March, 1951, according to the provisions of Section 65.030 RSMo. 1949. The situation thus created is that there will not be any election for treasurer in your county in November, 1954, because Daviess County will at that time be, as you are now, and as it has been since the last Tuesday in March, 1951, a township organization county; and that the regular four year term of its treasurer will expire on December 31, 1954. In this situation, as we stated above, the question presented is whether, on December 31, 1954, this office will become vacant. If so, then can it be filled by appointment by the governor, since Section 4 of Article IV of the Constitution of Missouri states that the governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified.

In this respect we now direct attention to Section 12 of Article VII of the Constitution of Missouri, which reads:

"Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

Section 105.010, RSMo. 1949, reads:

"All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

Section 105.030, RSMo. 1949, reads:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such term, or for the

Honorable Walter H. Toberman

ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election; provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

The above section 12 of Article VII of the Constitution has been construed in the case of Langstron v. Howell County, 79 S.W. (2d) 99. At l.c. 102 of that opinion, the court states:

"Our Constitution (section 5, art. 14) provides that: 'In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified,' and section 11196 R.S. 1929 (section 9168, R.S. 1919), Mo. St. Ann. section 11196, p. 6141, reads: 'All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified.' We find no constitutional or statutory provision which either expressly or by implication excludes the county highway engineer, or the office of county highway engineer, from the operation and effect of the foregoing constitution and statutory rule so that since there is no "contrary provision" the rule so prescribed must be applied. It is said in 46 C.J. p. 968: 'The general trend of decisions in this country is that, in the absence of an express or implied constitutional or statutory provision to the contrary an officer is entitled to hold his office until his successor is appointed or chosen and has qualified.'* * *."

In the case of State v. Clark, 87 Conn. 537, the court held that under the constitutional provision that judges of the city and police courts may be appointed for terms of two years, there "was a vacancy" in the office of police judge of the city on the expiration of the two-year term for which he was appointed, though he was held over until his successor was appointed by the Legislature.

In the case of State v. Young, 68 So. 241, the Supreme Court of Louisiana held that the word "vacancy" in its literal and precise

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sense means a place that is empty or unoccupied, but, as applied to the expiration of a term of office, it is ordinarily given a more liberal and figurative meaning, conforming to the intention of the law maker and the purpose to be accomplished. According to the latter meaning, the expiration of the term of office creates a vacancy, though the incumbent is willing to continue performing the duties of the office.

In the case of Walsh v. People, 211 Pac. 646, the Supreme Court of Colorado held that where the constitution provided that every officer should exercise the duties of his office until his successor was duly qualified, does not give the incumbent a hold-over term until the qualification of his successor, and that, therefore, a vacancy exists on the expiration of his term within the meaning of the constitution, which authorizes the governor, in case of a vacancy, to appoint a person to discharge the duties of the office. Numerous other cases of like holdings could be cited, but we do not feel that there is any point in so doing.

In view of the above, it would appear that this office will become vacant on December 31, 1954, and that the governor may fill it by appointment at any time subsequent; that the incumbent may hold over until such appointment is made and the appointee is qualified admits of no doubt.

In making the above holding, we are not unaware that Section 54.030 RSMo. 1949, quoted by us above, states that a county treasurer shall "hold his office for a term of four years, and until his successor is elected and qualified.* * *" (Underscoring ours).

It will be noted that the above uses the word "elected" only, and does not use the word "appointed". Under this statute, therefore, the incumbent would hold over until her successor was elected and qualified, which election, as we stated above, would be in 1956, since Daviess has become a township organization county. However, it seems to us that this portion of Section 54.030, supra, constitutes an attempted restriction upon Section 12 of Article VII of the Missouri Constitution in that it attempts to restrict the filling of the office after the expiration of its regular term to election, whereas Section 12 of Article VII, supra, states that it may be filled by election or appointment. It is, of course, elementary that the statute cannot so restrict a provision of the Constitution.

CONCLUSION

It is the opinion of this department that the term of the treasurer of Daviess county will expire on December 31, 1954; that the office may be filled by appointment by the governor at any subsequent time; that the treasurer, whose term will expire on December 31, 1954, may hold over in this office until her successor is duly elected or appointed and qualified; that she should not have been a candidate for reelection in 1952 nor in 1954.

Honorable Walter H. Toberman

It is our further opinion that she may serve until April 1, 1957, unless her office is filled by appointment by the governor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

Enclosure
HPW/ld/vtl

REORGANIZED SCHOOL
DISTRICT:



When a school district becomes a part of a reorganized district, it loses its former identity; it cannot thereafter be removed from or voted out of the reorganized district, for the reason that it has lost its original identity, and for the further reason that even if it had not lost its former identity, no such powers are vested in the reorganized district; that if and when the reorganized district becomes dissolved, all of the territory formerly comprised in it becomes unorganized territory.

April 7, 1954

Honorable Donald P. Thomasson
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"When a school district is consolidated with other adjoining school districts into a reorganized school and contributes all its school funds on hand into the funds of the reorganized school district, is it entitled to its proportionate share of such funds originally contributed in the event it is removed from or voted out of the reorganized school district."

Subsequently, in response to some inquiries by us regarding your opinion request, you wrote as follows:

"Thank you for your letter of March 17th and in reply, by a reorganized school district I refer to the reorganization of a school district in accordance with Section 165.677 RSMo 1949. The particular reorganized school district to which I refer is the Patton School District of Bollinger County, Missouri, which was enlarged in accordance with the reorganization plan prepared by the Bollinger County Board of Education and included several school districts, two of which are now contemplating removing or disassociating themselves from the reorganized district. It is my understanding that a reorganized school district may disorganize in accordance with Section 165.707 and Section 165.263 through Section 165.373 RSMo 1949. If one or more common school districts can remove themselves from a reorganized school district then these common school districts want to take back the exact amount of all the funds which they contributed at the time they went into the reorganized school district."

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Your question, whether, when a school district is removed from or voted out of a reorganized school district, it is entitled to its proportionate share of the reorganized district funds, is predicated upon the assumption that after a school district has been consolidated with other school districts in a reorganized district it "may be removed from or voted out of the reorganized school district."

We believe this assumption to be without foundation. We are unable to find any method by which a district may be removed from or voted out of a reorganized district. On the contrary, we do not believe that there is any way in which this can be done.

We note your statement that the reorganization in the instant case was under Section 165.667 RSMo 1949. The subject of "reorganization of school districts" is treated in Section 165.657 through Section 165.707, and, of course, includes Section 165.677, mentioned by you. That section reads:

"Upon the receipt of such reorganization plan from the county board of education, as provided in section 165.673, subsections 2, 3 and 4, the state board of education shall examine and either approve or disapprove such plan. If the plan includes any proposed district with territory in more than one county, the board shall designate the county containing the greater portion of such proposed district based upon the assessed valuation, as the county to which that district shall belong. Such approval or disapproval shall be conveyed to the secretary of the county board of education within sixty days following receipt of such plan by the state board of education. In the event the state board of education shall find that such reorganization plan is inadequate, it shall return said plan to the secretary of the county board of education accompanied by a full statement from said state board of education as to its reasons for finding such reorganization plan inadequate. The county board of education shall have sixty days to review the rejected plan, make alterations, amendments and revisions as may be deemed advisable and return the revised plan to the state board of education for its approval. If the revised plan is disapproved by the state board of education the county board of education is hereby required to propose and submit its own plan to the voters on the first Tuesday in November, 1949; provided, that no enlarged district may be so proposed or submitted without the approval of the state board of education which does

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not have an assessed evaluation of at least five hundred thousand dollars, or one hundred pupils in average daily attendance for the preceding year, and such plan shall be submitted to the qualified voters, as herein provided, in the same manner as if the plans had been approved by the state board of education. Nothing in sections 165.657 to 165.707 shall be construed as preventing the establishment and operation of more than one school in any enlarged district."

Section 165.707, R. S. Mo. 1949, reads: "Changes of boundary lines and disorganization of enlarged districts may be effected as now or hereafter provided by sections 165.263 to 165.373."

It will be noted that the above section relates to changes of boundary lines of the reorganized district and to disorganization of the entire reorganized district.

Section 165.263 through 165.373, referred to above, certainly do not provide for the removal of a district from a reorganized district by changing the boundary lines of the reorganized district, nor do they provide any means of voting a district out of a reorganized district. As a matter of fact, it appears to us that when a school district goes into and becomes a part of a reorganized district, it completely loses its identity, becomes merged indistinguishably with the other district which together compose the reorganized districts, and could not be recreated by any act of the reorganized district, or by the courts.

This is clearly true when the entire reorganized district is dissolved.

In the 1919 case of State v. Consolidated School District No. 3, 209 S.W. 96, an information in the nature of a quo warranto was filed for the purpose of annulling the corporate franchise of Consolidated School District No. 3, on the ground that it had failed to perform all of the duties imposed upon it by law, to-wit, the maintenance of a high school.

At l.c. 97, the Missouri Supreme Court in its opinion stated:

"* * * The learned trial judge found that respondents had not established or maintained a high school or consolidated district school since the organization of said consolidated school district No. 3, whereupon he rendered judgment, on June 14, 1918, 'that said consolidated school district No. 3 of Pike County, be and the same is hereby dissolved,

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and its charter, rights, and franchises in all respects forfeited and held for naught,' and further, that its directors named in the present proceeding be ousted from their positions and shorn of all authority as such directors. The learned trial judge further ordered and decreed that the several school districts out of whose territory said consolidated district was formed be restored to all the rights they had prior to the establishment of said consolidated district with full power and authority in each of said districts 23, 26, 28, 32, and 33 to manage its own school affairs by a board of directors, as if no consolidated school district had ever been formed."

At l.c. 98, the court stated:

"Plainly the judgment of the circuit court which sought to resuscitate the defunct school district was de hors the pleadings in this case and de hors the power of the court to render. Laws 1913, p. 723, Sec. 6; State ex inf. v. Smith, 271 Mo. loc. cit. 177, 196 S.W. 17. If the present consolidated school district was legally established (which is the basic allegation of relator's suit), then its dissolution, even if validly decreed, would not, per se, restore the corporation franchises of the previous school districts, nor restore its directors to their former offices and functions. Neither was it the judicial power of the circuit court, after dissolving the consolidated district, to re-create and restore the former districts or their officers, even if such issue had been within the pleadings, for when the former districts ceased to exist as such, the terrain comprehended within them became a part of the new consolidated districts formed thereof, and upon a valid dissolution of the latter such terrain would become 'unorganized territory' (R.S. 1909, Sec. 10776), and could thereafter be organized into school districts only by the method prescribed in the statute and upon the votes of its inhabitants (R.S. 1909, Sec. 10836). It is clear, therefore, that so much of the judgment of the learned trial court as undertook to reincorporate the former school districts and refunction their officers was outside the issues on trial, as well as outside the pale of judicial authority. So much, therefore, of the decree in the present case as undertook to do this, was a simple nullity."

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In the more recent (1949) case of Hydesburg Common School District v. Rensselaer Common School District, 218 S.W.(2d) 833, the St. Louis Court of Appeals affirmed the holding in the 1919 case referred to above.

These cases, we believe, are authority for our position that, when a common school district goes into a reorganized district, it loses its identity and cannot be re-established by any action of the district or of a court; that when the reorganized district becomes dissolved all of its territory becomes unorganized territory; and that school districts can only be formed out of it by positive action on the part of people residing in it, by acting to establish a new district or districts out of the old territory. There is, of course, specific statutory procedure by which this can be done. Since this is the situation, there can be no question of a district recovering any money or property from the reorganized district, "in the event it is removed from or voted out of the reorganized district." This, because of the fact that it cannot be removed from or voted out of the reorganized district.

CONCLUSION.

It is the opinion of this department that when a school district becomes a part of a reorganized district, it loses its former identity; that it cannot thereafter be removed from or voted out of the reorganized district for the reason that it has lost its original identity, and for the further reason that no such powers are vested in the reorganized district; that if and when the reorganized district becomes dissolved all of the territory formerly comprised in it becomes unorganized.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

ELECTIONS: Fred C. Bollow not the legal nominee of the
Democratic party to the office of Circuit Judge
JUDICIAL COMMITTEE: of the Second Judicial Circuit because there
was no quorum of the judicial committee present
QUORUM: at the meeting at which he was nominated on
July 29, 1954.



September 15, 1954

Honorable Walter H. Toberman
Secretary of State
State of Missouri
Jefferson City, Missouri

Dear Mr. Toberman:

This is in response to your request for opinion dated
July 30, 1954, which reads as follows:

"This office has received a 'Certificate of Nomination' from two members of the second judicial district committee attesting to the nomination of Fred C. Bollow to be the district nominee for the remainder of the unexpired term of the late Judge Harry J. Libby, who died on July 14, 1954.

"We are also in receipt of a 'Notice of Meeting' directed to Mrs. Preston Walker, Vice Chairman and Acting Chairman of the Macon County Democratic Committee. She is also the third member of the existing judicial committee. Also attached are two 'Waiver of Notice' forms signed by Mr. Bollow and Alice McCarty, Vice-Chairman of the Shelby County Democratic Committee. Both of the latter are Members, of course, of the second judicial district committee.

"On the reverse side of the enclosed 'Notice of Meeting' is a written statement signed by a deputy sheriff of Macon County.

"These various documents stated Mrs. Preston was notified of a meeting held July 29, 1954, in Macon, but she did not appear. They also state that at this meeting Members McCarty and Bollow declared Mr. Bollow nominated by virtue of receiving the only two votes cast.

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It is also set forth in the attached 'Certificate of Nomination' that a vacancy has existed on this judicial committee for 'some months' because Romet Bradshaw, Chairman of the Macon County Democratic Committee resigned and no successor had been elected and qualified to fill this position.

"This office respectfully requests an opinion on the following questions:

1. Is Mr. Bollow legally made the nominee by virtue of only two votes being cast for him?
2. If he was nominated properly, is this true because he received a majority of the votes cast by those present; or, was he nominated because he received two votes out of a possible three because the vacancy had reduced the committee, legally, from a four member body to a three member group at the time of the meeting?
3. If Mr. Bollow was not legally nominated at this meeting what procedure should the committee have followed on this matter?
4. If Mr. Bollow was not legally nominated and it is necessary to call another meeting of the second district judicial committee after the election of new county committee officers on August 17th, should the new nomination be made by the old county committee officers or the new chairmen and vice-chairmen?"

We know from the provisions of Section 478.080, RSMo 1949, that the Second Judicial Circuit is composed of the counties of Macon and Shelby, and from Section 120.800, RSMo 1949, that the judicial committee is composed of the chairman and vice-chairman of each county committee in the district; therefore, the judicial committee of the Second Judicial Circuit is composed of four members.

Upon the death of Judge Harry J. Libby, it became the duty of the judicial committee of each party to nominate a candidate for the ensuing general election under the provisions of Section 120.550(3), MoRS, Cum. Supp., 1953. That section reads:

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"The party committee of the county, district or state, as the case may be, shall have authority to make nominations in the following cases:

* * * * *

"(3) When a vacancy in office which is to be filled for the unexpired term at the following general election, shall occur after the last day in which a person may file as a candidate for nomination."

From the documents presented with your request, it appears that the Chairman of the Macon County Democratic Committee had resigned some months prior to July 29, 1954, and that this vacancy on the committee had not been filled on that date. On July 29, 1954, the Chairman and Vice-Chairman of the Shelby County Committee met for the purpose of nominating a candidate for circuit judge. Although the Vice-Chairman of the Macon County Committee was notified of this meeting, she did not appear, which raises the first question as to whether there was a quorum present at this meeting so as to make the action taken thereat effective.

The term "quorum" is defined as the number of members of a deliberative or judicial body whose presence is necessary for transaction of business. 23 Am. and Eng. Ency. of Law, Second Edition, page 589; State ex rel. Kiel v. Riechmann, 239 Mo. 81, 106, 142 S.W. 304; Bouvier's Law Dict., Rawles' Third Edition, Volume 3, page 2790; Black's Law Dict., Fourth Edition, page 1421. For the origin of the term "quorum," see Blackstone's Commentaries I.351.

Often the number necessary to constitute a quorum of a deliberative body will be expressly stated by the creative power or the authority to designate what shall constitute a quorum delegated to such body, but it is significant to note that the statutes providing for the judicial committees do not specify what shall constitute a quorum, nor is the authority to define a quorum delegated to such committee. Under such circumstances as stated in State ex rel. Robert Otto, Attorney General, v. Kansas City et al., 310 Mo. 542, 586:

" * * * We must look then to the common law as to what in such case would constitute a quorum, and the rule here clearly applicable is thus stated in 29 Cyc. 1688:

"Where a quorum is not fixed by the constitution or statute creating a deliberative body, consisting of a definite number, the general rule is that a quorum is a majority of all the members of the body."

The statement of the common-law rule, above quoted, does not fully solve our problem in this case, however. We must further determine what is meant by "a majority of all the members of the body" because the potential and contemplated membership of the Judicial Committee of the Second Circuit is four, whereas, by virtue of the vacancy thereon, there were, in fact, only three members remaining and existing. If the phraseology above quoted refers to the potential membership, a majority thereof, and hence a quorum, would be three, but if it refers to the existing membership, making a deduction for vacancies in arriving at the number constituting "all the members of the body," a majority thereof, and hence a quorum, would be two.

Although we find no Missouri case based upon the common law involving this precise factual situation, we know from the Missouri cases on the subject of quorums generally that we must turn to the common law in order to find the answer to the question here presented. *State ex rel. Otto v. Kansas City*, supra; *State ex rel. Kiel v. Riechmann*, supra. Although the term "common law" has various meanings, generally, when we use the term in this connection we mean the unwritten law as defined by Blackstone, that portion of the law of England which is based, not on legislative enactment, but on immemorial usage and the general consent of the people. 15 C.J.S., Common Law, Section 1(o), page 612.

As will be hereinafter noted, we find conflicting statements from various text writers as to what the English law is, and was, on this precise subject. They are all in agreement that a majority of the body constitutes a quorum, but differ as to the method of reckoning the membership of the body.

For example, in *McQuillin*, Vol. 4, *Municipal Corporations*, Third Edition, Section 13.28, page 478, it is stated:

"At common law, in corporations consisting of an indefinite number, a major part of those who are existing at the time, when legally convened, are competent to act for the corporation. This rule is applicable to New England towns. But when the body is definite there must be a major part of the whole number of members composing it, and not merely a

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major part of its existing members. When such body is legally assembled, a majority thereof may do valid acts for the corporation. This rule of the common law has often been declared by statute." (Emphasis ours.)

In Cushing, Law and Practice of Legislative Assemblies, Section 247, page 94, the rule is stated thus:

"In all councils and other collective bodies of the same kind, it is necessary, therefore, that a certain specified number, called a quorum, of the members, should meet and be present, in order to the transaction of business. This number may be precisely fixed in the first instance, or some proportional part established, leaving the particular number to be afterwards ascertained, with reference to each assembly, and this may be done either by usage, or by positive regulation; and, if not so determined, it is supposed, that a majority of the members composing the body constitute a quorum. * * *

Section 261, page 100:

"When the number, of which an assembly may consist, at any given time, is fixed by constitution, and an aliquot proportion of such assembly is required in order to constitute a quorum, the number of which such assembly may consist and not the number of which it does in fact consist, at the time in question, is the number of the assembly, and the number necessary to constitute a quorum is to be reckoned accordingly. Thus, in the senate of the United States, to which by the constitution each State in the Union may elect two members, and which may consequently consist of two members from each State, the quorum is a majority of that number, whether the States have all exercised their constitutional right or not. So, in the second branch of congress, in which, by the constitution, the whole number of representatives of which the house may consist is fixed by the last apportionment, increased by the number of members to which newly admitted States may be entitled, the quorum is

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a majority of the whole number, including the number to which such new States may be entitled, whether they have elected members or not, and making no deductions on account of vacant districts." (Emphasis ours.)

It is interesting to note, however, that this latter rule was departed from during the War Between the States when several of the states seceded from the Union and did not send members to Congress. The Supreme Court of Florida, in Opinions of the Justices, 12 Fla. 653, recognized this but declared it an error excusable only because of the exigency of the situation.

In the Florida opinion, above cited, the senate had convened and adopted a resolution impeaching the governor. The Florida Constitution provided for twenty-four senatorial districts and that each district should be entitled to one senator. Twelve senators were present. It was held that the least number which could constitute a quorum was thirteen, a majority of the whole number, and that vacancies from death, resignation or failure to elect could not be deducted in ascertaining a quorum. In the course of the opinion it was said, l.c. 679:

"According to the authorities afforded by the English books relating to municipal corporations, there must be present at a corporate assembly, besides the President, a majority of each integral part, if composed of a definite number, and not merely a majority of the surviving or existing members of each class. Indeed, if there be not a surviving majority of the constitutional members, no corporate assembly, say those authorities, can be formed, and the functions of every meeting in which that class ought to participate are suspended." 4 T. R. 823; 6 do., 278; 4 East., 26; do., 307; Cowen's notes to ex parte Willcocks, 7 Cow., 410; 7 S. and R., 517; 9 Foster, 213; Angell and Ames on Corp., ssos. 501, 506."

See also 46 C. J., Parliamentary Law, Section 8, page 1378:

"It is a well established parliamentary rule that a quorum of the body must be present in order to validate its action or to transact any business. In order to constitute a quorum it is not necessary that the entire

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membership of the assembly be present. In reckoning a quorum the general rule is that, in the absence of a contrary provision affecting the rule, the total number of all the membership of the body be taken as the basis; and ordinarily a majority of the authorized membership of a body, consisting of a definite number of members, constitutes a quorum for the purpose of transacting business; * * *"
(Emphasis ours.)

Contrary to the above authorities, we find this statement in 62 C.J.S., Municipal Corporations, Section 399(c), page 758:

"Although there is some authority to the contrary, particularly where a charter or statute defines a quorum as a majority of the whole number of councilmen, as a general rule, if there is a vacancy in the council or governing body, a majority of the remaining members will suffice for a quorum, especially where a statute or charter defines a quorum as a majority of the council, or similar phrase, as distinguished from a majority of the entire board 'elected,' or similar terms. Thus, in reckoning a quorum, the rule ordinarily is not to count as members those who are not at the date of the meeting legal members of the body; and, hence, those are omitted from the count of members who, by reason of resignation, recall, or removal from their respective wards, are out of office; and also those whose terms of office have expired."

The cases cited as authority for the above proposition are: Nesbitt v. Bolz, 91 P. 2d 879, 13 Cal. 2d 677; Ross v. Miller, 178 A. 771, 115 N.J. Law 61; State v. Orr, 56 N.E. 14, 61 Ohio St. 384; and People v. Wright, 71 P. 365, 30 Colo. 439. All of these cases involve the problem of filling a vacancy existing on the body itself, and only one, Ross v. Miller, supra, purports to be based upon the common law. All the rest involve the construction of a statutory or constitutional provision and represent an effort by the courts to arrive at the intent of the Legislature or the framers of the Constitution. Without going into the merits of the argument to be made for the rule contained in the above cases respecting the filling of a vacancy on a body itself, we should like to point out that this office has ruled contrary to

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the cases above cited in an opinion issued to Honorable Chas. A. Lee under date of September 27, 1934, copy enclosed. See also State ex rel. Thurlo v. Harper (No.), 80 S.W. (2d) 849, 852.

Ross v. Miller, supra, does, however, make the flat statement that the common law was that in case of a vacancy a quorum consisted of a majority of the remaining members. At 178 A., l.c. 772, the court said:

"At common law, a majority of all the members of a municipal governing body constituted a quorum; and in the event of a vacancy a quorum consisted of a majority of the remaining members. Hutchinson v. Belmar, 61 N.J. Law, 443, 39 A. 643, affirmed 62 N.J. Law, 450, 45 A. 1092; Tappan v. Long Branch, etc., Commission, 59 N.J. Law, 371, 35 A. 1070; Mueller v. Egg Harbor City, 55 N.J. Law, 245, 26 A. 89; Cadmus v. Farr, 47 N.J. Law, 208. And it was likewise the rule at common law that a majority of a quorum was empowered to fill a vacancy, or take any other action within its proper sphere. Housman v. Earle, 98 N.J. Law, 379, 120 A. 738; Cadmus v. Farr, supra; 19 R.C.L. 890; 43 C.J. 506, 507."

The oldest New Jersey case cited in Ross v. Miller, supra, is Cadmus v. Farr, 42 N.J. Law 208, 19 R.C.L. 890. That case merely declared the common law in general and cited, among other cases, that of The King v. Bellringer, 4 T.R. 810, decided in the thirty-second year of the reign of George III. Therefore, in order to check the accuracy of the statement of the common law contained in Ross v. Miller, supra, it behooves us to analyze the case of The King v. Bellringer, supra.

In that case the charter of the city of Bodmin required that the mayor and common clerk for the time being, and the common council for the time being, or the major part of them, should elect all the officers and ministers of the borough. The common council was a definite body consisting of thirty-six members, but on the date in question there were only eighteen of the common council living and surviving. On this date a majority of those remaining elected the defendant as one of the capital burgesses by which he claimed title. The action was one of quo warranto in which the defendant was ousted.

Lord Kenyon, Ch. J., delivered the unanimous opinion of the court, wherein, at 4 T.R., l.c. 823, he said inter alia:

" * * * But the cases which were cited in the argument of this case, are all one way, that there must be a major part of the whole number, constituted by the charter, in order to make the elections, and to do the several other acts under it. In R. v. Varlo (b), Lord Mansfield observed upon the distinction, which is extremely well founded, between corporations consisting of a definite and an indefinite number; that in the latter a major part of those who are existing at the time is competent to do the act; but that where the body is definite (as it is in this case) there must be a major part of the whole number. His Lordship's words are, 'Upon the words of the charter alone, I myself have no doubt about the construction of it. In this corporation there are an indefinite number of freemen; and it is a corporation in which honorary freemen may be made. It is in the nature of all corporations to do corporate acts; and where the power of doing them is not specially delegated to a particular number, the general mode is for the members to meet on the charter-days, and the major part who are present do the act. But where there is a select body, it is a different thing, for there it is a special appointment. All the reasoning therefore is different.' It appears to me therefore that it was his opinion, and that of the Court, that where there is a definite body, there must exist at the time when the act is done a major part of that definite body; it is not necessary indeed that they should all concur in the election, or other act done; but they must be present; and the election at such meeting is in point of law an election by the whole. In the case of R. v. Monday (a), Lord Mansfield asked this question, 'Is there any case where the charter has directed the election to be by the majority of the body, in which it has been held that a less number than a majority of the whole corporate body can elect? For instance, suppose the corporate body consisted of twelve, and two were dead; is there any instance where the charter has said that the election shall be by a majority of the body, in which it has been held that six, which are a majority of the remaining ten, were sufficient to elect?' This

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question was immediately answered by Aston, J. who said, that 'In R. v. Reese and R. v. Newham, it was clearly understood that if the major part of the corporation had been dead, it would have been in fact dissolved, or at least those who survived could not have assembled for the purpose of an election.' * * *

It is clear from a reading of *The King v. Bellringer*, supra, and the cases cited therein, that when the body is definite as it is in this case there must be a major part of the whole body and not merely a major part of the remaining members in order to constitute a quorum at common law. Therefore, the statement of the common-law rule as contained in *Ross v. Miller*, supra, on which the text of C.J.S. is based, is erroneous.

The King v. Bellringer, supra, was cited in *Blacket v. Blizard*, 9 B & C 851, which in turn was cited in *State ex rel. Otto v. Kansas City*, supra, and recognized as a part of the common law of England. Although this precise factual situation was not present in the last-mentioned case, we can only assume that the Supreme Court of Missouri, in recognizing the line of cases represented by *Blacket v. Blizard*, supra, as declaratory of the common law, would also render the same recognition to *The King v. Bellringer*, supra, as declaratory of the common law under the facts as here presented.

Since action by a deliberative body at a meeting of which no quorum was present is void, and since we must use the common-law rule in arriving at the number necessary to constitute a quorum, which rule requires a majority of the whole body and not merely a majority of the remaining members in case of a vacancy, we can only conclude that the action of the Democratic Judicial Committee of the Second Judicial Circuit taken at the meeting thereof on July 29, 1954, at which Fred C. Bollow was nominated for the office of Circuit Judge for the Second Judicial Circuit, was void because of the lack of a quorum.

Therefore, the answer to your first question is that Mr. Bollow is not legally the nominee of the Democratic party for the office of Circuit Judge for the Second Judicial Circuit.

Having answered this first question in the negative, this being the only question properly presented to you at this time, we respectfully refrain from answering the remaining questions in your request.

Honorable Walter H. Toberman

CONCLUSION

It is the opinion of this office that the meeting of the Democratic Judicial Committee of the Second Judicial Circuit on July 29, 1954, was not a valid meeting for the lack of a quorum and that as a consequence Fred C. Bellow is not at this time the legally nominated candidate of the Democratic party for the office of Circuit Judge of the Second Judicial Circuit.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Enc .

SWAMP AND OVERFLOWED LANDS:: 1)

PATENTS:

Patents should be issued for
swamp and overflowed lands to
counties in which such lands
lie, by the State, under Sec.
241.080, RSMo 1949. 2) When
such patents to such lands have
been issued by the State to
counties and when payment in full
has been made for such lands by
the purchaser, the County Court
shall cause the clerk of said
court to issue to the purchaser
or his heirs or assigns, a patent
under Sec. 241.220, RSMo 1949.



November 29, 1954

Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Attention: Honorable Will Davis,
Chief Clerk.

Dear Mr. Toberman:

This will refer to your recent request for the opinion of this office respecting the question of whether or not the Secretary of State may issue a certified copy of a patent to a parcel of land in Ray County, Missouri, where the records of your office do not show that a patent has been issued to Ray County, Missouri, or to an individual, and if so, to whom should said patent be issued. Your letter requesting the opinion states the following:

"This office has been asked to furnish a certified copy of a patent to a parcel of land, described as the Southwest Quarter of the Northwest Quarter of Section 22, Township 51, Range 27 West, situated in Ray County, Missouri, to comply with requirements made on said land by Gardner Smith, Attorney for Phoenix Mutual Life Insurance Company, Kansas City, Mo.

"We fail to find any record of a patent having been issued to an individual or to the County of Ray for this land. We do find a certification made on the 15th day of July, 1867, in which it was ordered that the clerk of the county court certify to the Governor that S.A. Richardson

Honorable Walter H. Toberman:

had made full payment of the principal
and interest on the following described
Swamp and Overflowed Lands, to-wit:

"SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 22, Township 51, Range 27 W, Ray County
SW $\frac{1}{4}$ of SW $\frac{1}{4}$ " " " " " " " " "
NW $\frac{1}{4}$ of SW $\frac{1}{4}$ " " " " " " " " "

"This certificate is signed by Geo. N. McGee,
Clerk of the County Court of Ray County. We
find that a patent was issued for only the
SW $\frac{1}{4}$ of SW $\frac{1}{4}$. None were issued for the SW $\frac{1}{4}$ of
NW $\frac{1}{4}$ and for the NW $\frac{1}{4}$ of SW $\frac{1}{4}$.

"The Garner Abstract and Title Company,
Richmond, Missouri, have asked if a patent
can be issued for this land at this time
and have referred us to Section 241.080,
R.S. Mo., 1949.

"Will you please give us your opinion as
to whether or not such patent can be is-
sued, and if so, to whom should said patent
be issued.

"Thanking you, we remain"

The question to be considered and here determined is
apparently incidental to the completion of an abstract of
title to said parcel of land in the negotiation of a loan
from a life insurance company which requires the abstract
to include a patent, or patents, transferring the legal
title to such land from the State and county to the owner.

The description of the land for which the issuance
of the certified copy of a patent has been requested is
designated in your request as the Southwest Quarter of the
Northwest Quarter of Section 22, Township 51, Range 27 West,
situated in Ray County, Missouri. The request advises that
there is no record in the office of the Secretary of State
of a patent having been issued to an individual or to the
County of Ray, in the State of Missouri, for the Southwest
Quarter of the Northwest Quarter of Section 22, Township 51,
Range 27 West, in said county.

Your request further advises that you do find a cer-
tification, dated July 15, 1867, by the County Clerk of Ray

Honorable Walter H. Toberman:

County, Missouri, and signed by him, of an order (presumably made by the County Court of said Ray County) that the Clerk of the County Court certify to the Governor that a named individual had made full payment of the purchase price of the following described Swamp and Overflowed Lands, to-wit:

"SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 22, Township 51, Range 27 W, Ray County
SW $\frac{1}{4}$ of SW $\frac{1}{4}$ " " " " " " " " " "
NW $\frac{1}{4}$ of SW $\frac{1}{4}$ " " " " " " " " " "

We are further advised that a patent was issued for the Southwest Quarter of the Southwest Quarter of said Section, Township and Range, as so described, but no patents were issued for the other two Quarter Quarter Sections of said Section, Township and Range, so described in said certification, one of the two Quarter Quarter Sections being the Southwest Quarter of the Northwest Quarter of said Section, Township and Range in Ray County, Missouri, and being the Quarter Quarter Section Tract for which a certified copy of a patent thereto has been requested.

On the question of the authority of your office to issue a patent now to the Southwest Quarter of the Northwest Quarter of Section 22, Township 51, Range 27 West, of the Swamp and Overflowed Lands in Ray County, Missouri, attention has been directed to your office for our observation, on the right to issue such patent, to Section 241.080, RSMo 1949, in the consideration of this matter. That section reads as follows:

"In order to convey to the different counties in the State of Missouri a complete title to all the swamp and overflowed lands which have been granted and patented to the state of Missouri by an act of congress, entitled 'An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits,' approved September 28, 1850, the secretary of state is hereby directed to prepare a patent or patents, embracing all the swamp or overflowed lands lying within the limits of the several counties of this state, conveying thereby all the title and interest of the state of Missouri in and to such lands,

Honorable Walter H. Toberman:

to the counties in which such lands may lie, and when such patents have been prepared as provided in sections 241.010 to 241.280, they shall be presented to and signed by the governor of this state, attested by the secretary of state, and recorded by the secretary of state in his office."

In connection with Section 241.080, supra, Section 241.220, in the same chapter of the present revision of the statutes of this State, must be considered and its terms, in sequence to, and as a complement thereof, must be applied to the question of the issuance of a patent or patents in this case to the Quarter Quarter Section of land here involved.

We assume that it will be agreed by all that the legal title to any swamp or overflowed land must emanate from the government, the state, or a county, as the case may require, in perfecting the title to such land, by patent. 50 C.J. 1016, states the text on this principle as follows:

"The fee in swamp lands remains in the state or the county until the execution by the proper officer of a patent or deed as provided by the statute, but when the patent for such land issues it relates back to the date of the sale.

* * * * *

"Ordinarily the deed or patent for swamp lands transfers legal title to the grantee or patentee, and it is, of course, evidence of such title in the grantee or patentee, and is conclusive or sufficient in this regard in the absence of any showing to the contrary; and the legal title must prevail, unless a prior right or superior equity in the opposing claimant is shown. * * *."

(Citing supporting Missouri authorities in the footnotes.)

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Your request states, as we have noted, that there is no record of a patent being issued to the Southwest Quarter of the Northwest Quarter of Section 22, Township 51, Range 27 West, situated in Ray County, Missouri, to an individual or to the County of Ray.

Said Section 241.080, supra, provides for the issuing of patents by the State to the different counties of the State wherein swamp and overflowed lands lie to make a complete legal title to any such lands in such counties, which said lands were granted and patented to this State by the Act of Congress, authorized September 28, 1850. Such purpose clearly appears from the terms of the section itself. The section provides that the patent conveying the title of the State to any county in which such lands lie shall be prepared by the Secretary of State in conformity to the provisions of Sections 241.010 to 241.280, inclusive, which patent shall be presented to and signed by the Governor of this State, attested by the Secretary of State, and recorded by him in his office.

Compliance with the terms of said Section 241.080 would divest the State of its title to such swamp and overflowed lands, and invest the legal title to such lands in the several counties in which such lands, respectively, may lie. It would not complete the legal title to such land in a purchaser. The legal title in that event would still remain in the county where such land is situated until a patent or a deed is executed by the proper officers conveying the title of the county, as provided by statute, to a purchaser, or his heirs or assigns.

Referring further to the certification of an order by the County Clerk of Ray County to the Governor of this State, dated July 15, 1867, that an individual had paid in full the purchase price for the swamp and overflowed lands described in your request as: SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 22, Township 51, Range 27 W, Ray County; SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 22, Township 51, Range 27 W, Ray County; NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 22, Township 51, Range 27 W, Ray County, and giving consideration to the operation and effect of such payments on the right of said purchaser to a patent to said lands, we turn to the statute in force at the time of the certification noted. The provisions of the Revised Statutes of Missouri, 1865,

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constituted the law of this State on that subject on July 15, 1867, the date of the certification of the order to the Governor by the Clerk of the County Court of Ray County, Missouri, that the purchase price had been so paid for the Quarter Quarter Section in said Section, Township and Range, in Ray County, Missouri. Section 4 of Chapter 48 of the Revised Statutes of this State, 1865, page 278, then read as follows:

"Section 4. Whenever full payment shall be made for any of said lands by the purchasers thereof, the county courts shall cause the same to be certified to the governor, who shall thereupon grant to the purchaser, his heirs and assigns, a patent for the same; which patent shall be signed by the governor, countersigned by the secretary of state, and be recorded in the office of the secretary of state."

Section 4 of Chapter 48, RSMo 1865, supra, was amended Laws of Missouri, 1868, page 69, to authorize the register (registrar) of lands to issue a patent to swamp and overflowed lands conveying the legal title of the State to such lands to the purchasers upon certification by the County Court that the full purchase price therefor has been paid. The section as so amended reads as follows:

"Whenever full payment shall be made for any of said land by the purchaser thereof, the county court shall cause the same to be certified to the register of lands, who shall thereupon issue to the purchaser or purchasers, his or their heirs or assigns, a patent for the same, which patent shall be signed by the governor, countersigned by the secretary of state, and recorded in the office of register of lands."

This was the only method then provided by law for the title to such lands to pass from the State. The State was dealing, so far as the title to such lands was concerned, directly with the purchasers, hence a patent to such lands was granted directly to the purchaser by the Governor under said section. Section 4, Laws of Missouri, 1868, supra, page 69, was amended by Section

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6154, RSMo 1879. Said Section 6154 as so amended reads as follows:

"After full payment, patent to issue, how--
Whenever full payment shall be made for any of said land by the purchaser thereof, the county court shall cause the clerk of said court to issue to the purchaser or purchasers, his or their heirs or assigns, a patent for the same, which patent shall be signed by the presiding judge of the county court, countersigned by the clerk thereof, and recorded in the swamp land patent book, in the office of the county clerk. (Laws 1868, p. 69, § 4, amended.)"

The swamp and overflowed lands belonging to the State were, by the provisions of Chapter III, RSMo 1879, donated by the State to the several counties in which such lands lie, as the absolute property of such counties, in order to provide for the reclamation of such lands which were granted to the State by the said Act of Congress, approved September 28, 1828, and to be sold for a county school fund under Section 6155, RSMo 1879. The General Assembly in enacting Section 6154, RSMo 1879, omitted from the section the provision for the County Court of a county containing such lands to certify to the Register of Lands that full payment had been made for any such land by a purchaser.

The General Assembly, in said Section 6154 of the Revision of 1879, having donated all such lands in the counties wherein they lie to such counties, separately, as the absolute property of such respective counties, the General Assembly made further provision to effectuate such donation by providing that such counties under Section 6153, RSMo 1879, may sell such lands as public lands, and that under Section 6155 the net proceeds of the sale of such lands by such counties shall be paid into the county treasury to become a part of the public school fund of any such county.

The General Assembly in the Session of 1869 (Laws of Missouri 1869, page 66), passed a new and comprehensive Act relating to patents to swamp and overflowed lands in this State. Section 1 of that Act provided that the State's title to all such lands should be conveyed to the counties by patent, signed by the Governor, attested by the Secretary

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of State and recorded by the Register of Lands in his office. Said Section 1 was carried into the Revision of 1879 as Section 6200. That section, RSMo 1879, pages 1221, 1222, reads as follows:

"Title to swamp lands to be conveyed to counties.-- In order to convey to the different counties in the state of Missouri a complete title to all the swamp and overflowed lands, which have been granted and patented to the state of Missouri by an act of congress, entitled 'An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits,' approved September 28, 1850, the register of lands is hereby directed to prepare a patent or patents, embracing all the swamp or overflowed lands lying within the limits of the several counties of this state, conveying thereby all the title and interest of the state of Missouri in and to such lands, to the counties in which such lands may lie, and when such patents have been prepared as herein provided, they shall be presented to and signed by the governor of this state, attested by the secretary of state, and recorded by the register of lands in his office. * * *."

The Act of 1869 (Laws of Missouri, 1869, page 66), and the provisions of the Revision of the swamp and overflowed lands statutes of 1879 contained the material in their several sections from which our present Section 241.080 relating to the issuance of patents to such lands is derived. The preparation of patents to such land for their signature by the Governor and the attestation thereof by the Secretary of State, and their later recording in his office, were among the duties of the Register of Lands. The office of Register of Lands was abolished in this State in 1891. The Act of the General Assembly discontinuing said office of Register of Lands (Laws of Missouri, 1891, page 181), and imposing the duties of that office upon the Secretary of State reads as follows:

"SECTION 1. The office of register of lands for the state of Missouri shall be and is hereby abolished.

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SEC. 2. The secretary of state shall perform all the duties heretofore performed by and now required of the register of lands. On account of such additional duties imposed upon the secretary of state, he shall have one additional clerk.

SEC. 3. This law shall be in effect from and after the expiration of the term of office for which the present register of lands was elected. Approved February 25, 1891."

The provisions for the assumption and performance of the duties by the Secretary of State formerly imposed upon the Register of Lands to the effect that the Secretary of State should prepare a patent, or patents, to such swamp and overflowed lands lying within the limits of such counties conveying all the title and interest to the State of Missouri in and to such lands to such counties and that such patents be presented to and signed by the Governor of this State, attested by the Secretary of State and be recorded by the Secretary of State in his office, appeared in the Revised Statutes of 1899 as Section 8244; in the Revision of 1909 as Section 8023; in the Revision of 1919 as Section 7020; in the Revision of 1929 as Section 11156; in the Revision of 1939 as Section 12780, and appears in the present Revision of 1949 as our present Section 241.080.

Upon the payment of the purchase price for such lands and the certification of the order to the Governor by the said County Clerk of Ray County, Missouri, on July 15, 1867, acknowledging such payment, the purchaser then and thereby became the owner of the equitable title to such swamp and overflowed land. There are numerous decisions by the Supreme Court of this State so holding. We quote from one of such cases, *Kline vs. Groeschner*, 280 Mo. Rep. 599, where the Court, 1.c. 608, 609, said:

"* * * It was held by this court in case of *Mosher v. Bacon*, 229 Mo. 338, where land belonging to a county is sold by the county, and paid for, and the purchaser receives a certificate of purchase, thereafter the county is powerless to convey it to another person. The purchaser receiving the certificate of purchase would have an equitable title which would be good against all the world. It was further decided in that case,

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i.e. 349, that a purchaser has no control over the land office, nor over the state officers, whose duty it is to issue a patent and conform to the requirements of the law, and the failure of such officer to do his duty in that respect would not affect a purchaser's right or title."

Notwithstanding the payment of the purchase price in full for such lands, and that thereby the purchaser became the owner of the equitable title to such lands, the legal title to such lands still remains in the State until a patent is issued by the State to the county, and remains in the county until a patent is issued to such land by the county to the purchaser or his heirs or assigns. We now turn to said Section 241.220 for directions for issuing county patents. By this section when the purchase price for swamp and overflowed lands has been paid in full, as has been done in this case, the State having conveyed its title to such lands by patent to the county, a patent conveying the legal title of the county should issue from the county to the purchaser or his heirs and assigns, and in this case a patent should issue from Ray County to the purchaser or his heirs or assigns to the Southwest Quarter of the Northwest Quarter of Section 22, Township 51, Range 27 West, in Ray County, Missouri, to complete the legal title to said Quarter Quarter Section so involved.

The facts and conditions recited in the request disclose that no patent has ever been issued by the State to Ray County, Missouri, and that there is no record in the office of the Secretary of State of the issuance of such patent to comply with the terms of Section 241.080, supra, to the Southwest Quarter of the Northwest Quarter of Section 22, Township 51, Range 27 West, in said Ray County. The purchaser of said Quarter Quarter Section of land, upon the completion of the payment of the purchase price therefor, as the owner of the equitable title to said land, was then entitled, and is now entitled, to patents, respectively, from the State to Ray County and from said county to said purchaser or his heirs and assigns, to said land.

It appears to be clear in this matter that a patent should be issued by the Governor for the State according to the terms, and in conformity with such terms, of Section 241.080, to said Ray County, to said lands. But this is not enough to complete the legal or "paper" title to said

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lands. A patent also should be issued to said lands from the County of Ray to the present owner of said land, under the terms of said Section 241.220, conveying to such owner the legal title of the county to such land.

CONCLUSION

It is, therefore, considering the premises, the opinion of this office:

1) That in order to perfect the legal title to swamp and overflowed lands in any county in this State wherein such lands lie, the Governor of the State under Section 241.080, RSMo 1949, may sign and issue a patent, attested by the Secretary of State, to any such lands, conveying thereby all title and interest of the State of Missouri in and to such lands to the respective counties in which such lands may lie, and that when such patent is signed and issued by the Governor, attested by the Secretary of State, it shall be recorded by the Secretary of State in his office;

2) That it is the further opinion of this office that when such patent to the county wherein such lands lie has been issued and recorded in compliance with the terms of said Section 241.080, RSMo 1949, and when payment in full has been made for any of such land by the purchaser thereof, the County Court shall cause the clerk of said court under Section 241.220, RSMo 1949, to issue to the purchaser, or purchasers, his or their heirs or assigns, a patent for the same, which patent shall be signed for the county by the Presiding Judge of the County Court, countersigned by the clerk thereof and recorded in the Swamp Land Patent Book in the office of the County Clerk.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Very truly yours,

JOHN M. DALTON
Attorney General

GWC:irk

STATE PARKS:
APPROPRIATION:

Missouri State Park Board unauthorized to
establish revolving fund for payment of
expenses of concessions in state parks.



July 30, 1954

Honorable C. P. Turley
Chairman of the Missouri State Park Board
Van Buren, Missouri

Dear Mr. Turley:

This will acknowledge receipt of your request for
an opinion which reads:

"I should like to have an opinion on
this question:

"Under the present law does the State
Park Board have authority or power to
set up a revolving or operating fund and
employ some person on a straight salary
to operate the concessions in a state
park?"

If we understand your request correctly, you inquire
if the Missouri State Park Board is authorized to take a
portion of certain money appropriated by the General Assembly
to said board for the operation of state parks and place it
in a so-called revolving fund to be placed at the disposal
of an employee of said board for the purpose of paying ex-
penses incurred in the operation of a concession or conces-
sions at state parks. You further propose to place in said
revolving fund all income derived from such operations of
concessions at said parks and finally to hold said employee
accountable for same to your board.

Public officers are merely creatures of statutes with
limited authority and possess only such authority as vested
in them by statute and such necessary implied authority to

Honorable C. P. Turley

carry out that expressed. Lamar Township v. City of Lamar, 169 S.W. 12, 261 Mo. 171, Ann. Cas. 916, D. 740; State ex rel. Rosenthal v. Smiley, 263 S.W. 825, 304 Mo. 549.

Therefore, the Missouri State Park Board being a creature of statute as provided Chapter 253, Vernon's Annotated Missouri Statutes, is vested only with such authority as granted by the Legislature and necessary implied authority to carry out that granted by that body.

Chapter 253, supra, does not provide for any such revolving fund as proposed in your request. Section 253.070, Vernon's Annotated Missouri Statutes does authorize the Missouri State Park Board to make certain necessary expenditures in order to perform the duties imposed upon it by law. However, said statute contains a clause restricting the manner of payment and provides that expenditures by said board shall be allowed and paid out of funds appropriated for such purposes in the manner provided by law.

We are cognizant of the fact there are certain revolving funds established by acts of the General Assembly for certain departments and agencies of the state. However, this is only by reason of an act of the General Assembly authorizing same, and in the absence of such legislation, there can be no such revolving fund.

Since the Legislature has not seen fit to provide for such a revolving fund for the operation of concessions in state parks by the Missouri State Park Board, we must conclude that it was the legislative intent that said board should not operate under a revolving fund.

CONCLUSION

Therefore, it is the opinion of this department that in the absence of a statute authorizing a revolving fund for operation of concessions at Missouri State Parks, the Missouri State Park Board is not vested with authority to set up a revolving fund out of appropriations to said board for such purpose.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

ARH:vlw

COURT REPORTERS:
COUNTY COURTS:

County courts not required to defray any costs of supplies used by court reporter in preparing transcripts called for in Section 485.100, RSMo 1949.



January 11, 1954

Honorable Raymond H. Vogel
Prosecuting Attorney of
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

The following opinion is rendered in reply to your request reading, in part, as follows:

"The former Court Reporter for the 28th Judicial Circuit made certain bills in 1951 for paper clips, envelopes for transcripts and paper. Apparently all of these supplies were to be used in the preparation of transcripts for which the Reporter is paid according to the provisions of Section 485.100 V.A.M.S. Is Cape Girardeau County liable to pay its proportional share, according to population, of these expenses?"

Section 485.100, RSMo 1949, A.L. 1951, H. B. 255, provides a definite fee as compensation to a Court Reporter for preparing a transcript of testimony. No reference is made in such statute to any allowance to be made to the Reporter for actual expense incurred in preparing such transcript. Sections 485.090 and 485.095, RSMo 1949, A. L. 1951, H.B. 38, are the only statutes we have discovered which relate specifically to allowance to a Court Reporter for money actually expended by him in carrying out his statutory duties. Such statutes read as follows:

Honorable Raymond H. Vogel

"485.090. Certain reporters allowed actual expenses attending court.-- Every official court reporter of a circuit or criminal court of a judicial circuit comprised of two or more counties shall be allowed and paid all sums of money actually expended only in necessary hotel and traveling expenses while engaged in attending any regular, special or adjourned term of court at any place in the judicial circuit in which he is appointed; other than the county of his residence, or while engaged in going to and from any such place for the purpose of attending such terms of court. Such moneys shall be paid out of the county treasuries of the respective counties in said judicial circuit in proportion to their respective population."

"485.095. Expenses of reporter when transferred.--Whenever any official court reporter of any circuit court or a court of common pleas shall be temporarily transferred, as provided in section 485.055, he shall, in addition to the salary provided by law, be reimbursed for his actual and necessary travel and other expenses incurred in the performance of such temporary duty. Such expenses shall be paid out of the state treasury upon certification by such transferred official court reporter, and approval by the chief justice of the supreme court."

A reading of the statutes quoted above discloses that the allowance to be made to the Court Reporter, referred to therein, only comprehends necessary hotel and traveling expenses.

CONCLUSION

It is the opinion of this office that Circuit Court Reporters are required to furnish, at their own expense, supplies required in the preparation of transcripts called for by Section 485.100, R. S. Mo. 1949, A.L. 1951, H. B. 38, and County Courts are not required to defray any portion of the cost of such supplies.

Honorable Raymond H. Vogel

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO'M:irk:hr

TAXATION: Steamboat engaged in interstate commerce and owned
STEAMBOATS: by Delaware company is not subject to ad valorem
taxes in Missouri.

July 21, 1954



Honorable Raymond H. Vogel
Prosecuting Attorney
Cape Girardeau County
Farmers & Merchants Bank Building
Cape Girardeau, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"I hereby request your official opinion
on the matter set out in the following
paragraphs.

"A motor vessel, the Stanton K. Smith, is
owned by the Missouri-Illinois Barge Line
Company, a Delaware corporation. Fifty
per cent of the stock of this corporation
is owned by persons who reside in Cape
Girardeau and fifty per cent is owned by
persons who reside in Illinois. It ap-
pears that the State of Delaware has not
assessed any tax against this property.
The assessor of Cape Girardeau County has
assessed personal property taxes against
the property. The property is used to
transport goods along the Mississippi
River and its tributaries and the intra-
coastal canal. Apparently, the property
does not stay within Cape Girardeau County
for very long periods of time. At present
there is no repair dock in Cape Girardeau
County for this property, although it is
expected that one will be built in the
future and repairs will be made in Cape
Girardeau County.

Honorable Raymond H. Vogel

* * * * *

"May the assessor of Cape Girardeau County assess personal property tax against motor vessels and barges of a foreign corporation, which boats and barges are sometimes located within Cape Girardeau County but are almost continually operating in interstate commerce? Would it make any difference if the vessels are manned, serviced and repaired in Cape Girardeau County?"

Steamboats and other vessels used in navigating the waters of this state have been classified specially for the purpose of taxation under the provisions of Chapter 154, RSMo 1949. The pertinent statutes read as follows:

154.010:

"1. Steamboats and other boats and vessels used in navigating the waters of this state, and all shares, stocks and interest therein, are hereby declared a special class of property for the assessment and collection of taxes.

"2. All taxes on such property shall be assessed and collected in the county or city in which the owner or owners of said property may reside at the time of assessment."

154.020:

"1. Upon due return being made to the assessor of the proper county or city by the owner of any steamboat or other water craft, upon demand therefor the assessor shall issue a certificate for such boat setting forth the fact of the return, with the name of the owner and that of the boat and also the residence of the owner and the date of the return, stating the same to have been done in accordance with this chapter. The certificate shall be taken and held to be conclusive evidence, of the statements and facts therein made and recited, by all courts and officers in this state.

Honorable Raymond H. Vogel

"2. Such certificate shall be framed and hung up in the cabin of the boat in a conspicuous place."

Inasmuch as your letter of inquiry discloses that the steamboat under consideration is owned by a corporation, your attention is further directed to Section 137.095, RSMo 1949, which reads as follows:

"All tangible personal property of business and manufacturing corporations shall be taxable in the county in which such property may be situated on the first day of January of the year for which such taxes may be assessed, and every business or manufacturing corporation having or owing tangible personal property on the first day of January in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located, shall make return thereof to the assessor of such county or township where situated, in the same manner as other tangible personal property is required by law to be returned."

In an early case entitled *City of St. Louis v. Wiggins Ferry Company*, reported 40 Mo. 581 (erroneously cited 580 in Mo. Dig.), the court had under consideration the validity of a tax imposed under a city ordinance upon a ferry-boat operating between Illinois and Missouri.

In upholding the validity of the tax the court made the following specifications:

"The facts stated show that the city of St. Louis was the domicile and home port of these ferry boats; that the owner, though a corporation created in another State, had a principal office and place of business in this city, and was a resident here within the meaning of our law; that the chief officers of the company resided here, and were the acting managers for the owner, and that the boats plied from and to their home port, and were subject to the immediate control of the officers and agents residing here. That the boats,

Honorables Raymond H. Vogel

when not in use, were laid up on the opposite shore, or that the harbor regulations did not permit them to lie at the city wharf longer at a time than was necessary for receiving and discharging freight and passengers, or that the company also had an office and place of business in Illinois, or that two-thirds of the stock was owned in this city and in other States than Illinois, are all immaterial circumstances. The property is not assessed to the stockholders, but to the corporation by name. It makes no difference where the shareholders reside--Queen v. Arnaud, 9 Adolph & Ellis, 806; Ang. Corp. Sec. 109. The corporation is taxed as owner, and in respect of the boats as specific personal chattels, and not at all in respect of the stock or income. The personal property of the company which is permanently located, or actually situated in Illinois, is no doubt taxable there only, but these registered boats must be held to be taxable here only. * * *

However, in a subsequent suit involving taxes of the same nature which ultimately reached the Supreme Court of the United States and is reported as City of St. Louis v. Wiggins Ferry Company, 78 U.S. 423, 11 Wall. 20 Lawyer's Edition 192, the action of the Circuit Court of the United States for the District of Missouri in holding the subsequent taxes invalid, was affirmed. The case was decided upon a factual issue in that the lower court had determined as a matter of fact that at no time was the ferry boat involved "within the City of St. Louis" as would have been necessary to confer jurisdiction upon that municipality to impose a tax thereon. In disposing of the case and referring to the factual determination made by the lower court the Supreme Court said:

" * * * The court found that the boats, 'when not in actual use, were laid up by the Illinois shore, and were forbidden, by a general ordinance of the city of St. Louis regulating ferries and ferry-boats, to remain at the St. Louis wharf or landing longer than ten minutes at a time.' A tax was paid upon the boats in Illinois. Their relation to the city was merely that

Honorable Raymond H. Vogel

of contact there, as one of the termini of their transit across the river in the prosecution of their business. The time of such contact was limited by the city ordinance. Ten minutes was the maximum of the stay they were permitted to make at any one time. The owner was in the eye of the law a citizen of that state, and from the inherent law of its nature could not emigrate or become a citizen elsewhere. As the boats were laid up on the Illinois shore when not in use, and the pilots and engineers who ran them lived there, that locality, under the circumstances, must be taken to be their home port. They did not so abide within the city as to become incorporated with and form part of its personal property. Hays v. Pacific S. S. Co., 17 How. 599, 15 L. ed. 255; New Albany v. Meekin, 3 Ind. 481. Hence they were beyond the jurisdiction of the authorities by which the taxes were assessed, and the validity of the taxes cannot be maintained. R. Co. v. Jackson, 7 Wall. 262, 19 L. ed. 88. * * * (Emphasis theirs.)

There are two later cases of the United States Supreme Court which bear upon the problem you have presented. In Ott v. Mississippi Valley Barge Line Company, et al., reported 336 United States 169, 69 Supreme Court 432, that court had under consideration the validity of a tax imposed by the State of Louisiana. The property owners were foreign corporations of that state and were engaged in interstate commerce up and down the Mississippi and Ohio Rivers. No taxes were imposed upon the physical assets of the corporations in the states of their incorporation.

The Supreme Court applied the rule that vessels engaged in interstate commerce are normally taxable solely at the domicile of the owner except in instances in which such property acquired an actual situs elsewhere. The Wiggins Ferry Company case, cited supra, was referred to in the course of the opinion as enunciating this rule. However, the validity of the Louisiana tax was sustained upon a finding that under the facts a taxable situs had been acquired within the State of Louisiana. However, the Supreme Court further declared that even in those circumstances a reasonable apportionment must of necessity be

Honorable Raymond H. Vogs1

made by the taxing authority in order that neither the Due Process clause nor the Commerce clause of the Federal Constitution might be impinged upon. The decision turned to a great extent upon the assurance of the Attorney General of the State of Louisiana that the tax sought to be sustained in fact was only an average portion of the property of the foreign corporation permanently within the State of Louisiana throughout the taxing year.

Subsequently, the same court decided *Standard Oil Company v. Peck*, which is reported 342 U.S. 382, 72 Supreme Court 309. There under consideration was the applicability of the Ohio taxing statutes to the property of a domestic corporation of that state consisting of transportation barges, etc., which in fact did not come within the State of Ohio but were continuously used in the waters of foreign states. The State of Ohio again, upon language found in the *Wiggins Ferry* case cited supra, urged its power to tax the whole of the corporation property. The court declared, however, that the rationale of the earlier cases had been revoked in *Ott v. Mississippi Barge Line Company*, cited and discussed herein supra. The State of Ohio further urged that the facts in the case then under discussion did not disclose that any specifically defined portion of the domiciliary corpus had acquired a taxable situs elsewhere. The Supreme Court held that inasmuch as property so used was susceptible of being subjected to the taxing power of other jurisdictions wherein a taxable situs might be acquired, the State of Ohio could not tax the entire property of the corporation. The court used the following language:

" * * * No one vessel may have been continuously in another state during the taxable year. But we do know that most, if not all, of them were operating in other waters and therefore under *Ott v. Mississippi Barge Line Co.*, supra, could be taxed by the several states on an apportionment basis. The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. See *Union Refrigerator Transit Co. v. Commonwealth of Kentucky*, 199 U.S. 194, 26 S. Ct. 36, 50 L. Ed. 150. Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."

Honorable Raymond H. Vogel

We have examined the statutory law of the State of Missouri and have given due regard to the facts relating to the operation of the steamboat as set forth in your letter of inquiry. We believe that neither the State of Missouri nor any of its subdivisions have the power to impose ad valorem tax upon the vessel mentioned in your letter of inquiry for the following reasons:

(1) The operations of the vessel are not such as to indicate that a taxable situs has been acquired within the State of Missouri; and,

(2) That even assuming that such a taxable situs has been acquired, no basis for the ratable apportionment of the valuation of such vessel has been established under Missouri statutes so as to avoid the inhibitions of the Due Process and Commerce clauses of the Federal Constitution.

CONCLUSION

In the premises we are of the opinion that a vessel engaged in interstate commerce and owned by a foreign corporation may not be subject to ad valorem taxation by the State of Missouri or any of its subdivisions.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

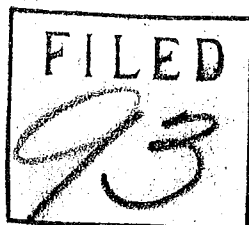
Very truly yours,

John M. Dalton
Attorney General

WFB/vlw/vtl

CRIMINAL LAW: Priority of service of terms of punishment.

March 11, 1954



Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"Request is herewith presented for opinion directing us as to proper procedure in the following cause.

"One John Doe was charged in this jurisdiction with 3 separate felonies.

"In the first case tried he was charged Burglary 1st Degree, found guilty and convicted for a term of 10 years. In due course motion for new trial was overruled and defendants application for Appeal to Supreme Court filed. Same now pending in process.

"While his motion for new trial was pending in the matter above mentioned he was tried on a further charge and found guilty and punishment assessed at 1 year in County jail.

"The 3d charge is pending awaiting trial.

Honorable Stanley Wallach

"Our question is, shall we retain custody of defendant in our County to jail to serve first, the sentence of 1 year in the County jail, and upon completion thereof commit him to the State Penitentiary on the first mentioned sentence; or, commit him at this time to the State Penitentiary in accordance with the 10 year sentence and place our "Hold" upon completion thereof to be returned to serve the 1 year County jail sentence.

"As it now stands our Sheriff is holding 2 commitments; one for the 1 year county jail sentence and the other for commitment of the defendant to the State Penitentiary on the 10 year sentence.

"Will you kindly advise promptly, and oblige."

In the above-quoted request we have taken the liberty of inserting the name "John Doe" for that of the person which appears therein. Further, in preparation of the opinion we have assumed that the acts constituting the second felony were not committed subsequent to the first trial and that the record in both cases is silent as to whether the sentences are to be served concurrently or consecutively.

It will be observed at the outset that the only conviction which has become final is the one under which sentence of one year in the county jail has been imposed. It therefore seems appropriate that the Sheriff of St. Louis County incarcerate the defendant under such commitment in order that compliance may be had with the punishment imposed thereunder.

It is true that ordinarily sentences imposed by the same court upon the same defendant, in the absence of a direction of the trial court to the contrary, are to be served concurrently. In this regard we direct your attention to Williford v. Stewart, 198 S.W. (2d) 12, in which the defendant had pleaded guilty on February 6, 1933, in the Jackson County Circuit Court to four felonies. Subsequently, on April 8th, 1933, in the same court, although in a different division thereof, the same defendant was convicted of a further crime. No direction appeared in the judgment in the latter case as to whether the sentence imposed therein should be served concurrently or consecutively with the sentences imposed

Honorable Stanley Wallach

in the four prior cases. The Supreme Court of Missouri held in these circumstances that all of the sentences imposed should run concurrently. The Court said, l.c. 15:

"The judgment of the trial court being controlling, we must reject the spurious recital in the commitment that the burglary and larceny four year aggregate sentence and the automobile theft 15 year sentence should run consecutively, and must hold they run concurrently--which means that the period of the petitioner's legal incarceration began on February 6, 1933 and ran for 2 months and 2 days under the burglary and larceny aggregate sentence until April 8, 1933, when the 15 year sentence in the automobile theft case was pronounced. From there on the sentences in the five cases ran concurrently as far as coincident, and until the end of the 15 year sentence, making a total period of 15 years, 2 months and 2 days. Under the three-fourths rule, allowed by Sec. 9086 for good behavior, this time would be reduced to 11 years, 4 months and 17 days."

We think that this rule would be controlling in the instant case were it not for the further fact that the defendant in the case about which you have inquired was sentenced to separate institutions. This circumstance invokes a further rule which has been declared by the Supreme Court in Anthony v. Kaiser, 169 S.W. (2d) 47, l.c. 49 to the following effect:

"Ordinarily sentences to different institutions are, in the very nature of things, cumulative and not concurrent. * * *"

The converse of this rule was again stated by this Court in McCracken v. Kaiser, 179 S.W. (2d) 470, where the following language appears:

"The general rule is that in the absence of an applicable statute making the terms successive, or a direction to that effect in the sentence or commitment, terms imposed by the same court to the same institution are to be regarded as concurrent. * * *"

Honorable Stanley Wallach

From the foregoing we take it to be the rule that sentences to separate institutions in the circumstances described in your letter of inquiry are to be served consecutively in the absence of a direction by the trial court to the contrary. We are further persuaded to this view with respect to the instant case by reason of the fact that the sentence in the first case has not as yet become final in the sense that it amounts to a "conviction" until affirmed on the pending appeal. It is of course true that the defendant may be committed pending the appeal absent the giving of a supersedeas bond (as to which your letter of inquiry is silent) but in the event of a reversal and possible discharge of the defendant the case would stand as though no "conviction" had ever been had.

CONCLUSION

In the premises we are of the opinion that in the circumstances outlined in your letter of inquiry the defendant should be committed to the county jail of St. Louis County, Missouri, to serve the sentence imposed upon him of one year in that institution, and there to be held until discharged according to law.

We are further of the opinion that upon compliance with such sentence the defendant should thereafter be committed to the Missouri State Penitentiary to serve the sentence of ten years in that institution in accordance with the sentence imposed upon him in such other case, provided of course, that such conviction be affirmed on the pending appeal to the Supreme Court of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB:vlw

LOTTERIES:

"AUTOMOBILE GAME" IS A
LOTTERY:

"Automobile Game" consisting of numbered rectangular track over which small automobile is made to run is game of chance rather than of skill. For payment in advance of cash fee, one is permitted to operate device. Device is operated when the player first selects number, then propels automobile so that it hits bumpers at each end of track. Only when automobile stops on previously selected number is player awarded a prize. Said operation involves consideration, chance and prize, and is a lottery within the meaning of Missouri lottery statutes, particularly Section 563.430 RSMo 1949, declaring the making or establishing of a lottery a crime.

June 7, 1954

Hon. Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri



Dear Sir:

This department is in receipt of your recent request for a legal opinion which reads, in part, as follows:

"Mr. George F. Dueker of 37 Sappington Acres Drive, St. Louis (23) Missouri, called at this office accompanied by Rev. O'Connell of the Seven Holy Founders Church in Affton, Missouri, and presented to me your letter to Mr. Dueker dated April 28, 1954, in reference to your legal opinion on whether 'Darts' and 'Hoopla' are games of chance.

"In addition they submitted to me the attached memorandum of the contest they propose to conduct at their Church picnic on Saturday, May 29, 1954, and they have requested that I ask your office to render a further opinion as to whether the contest as set forth in said memorandum constitutes a violation of the gambling laws of this State."

The pertinent parts of the memorandum attached to the opinion request also read as follows:

"* * * The concession stands, which we propose to operate are: Country Store, Fancy Work, Ham and Bacon, Esquire and Sports. At these booths merchandise prizes will be given to the person who displays the most skill at

Hon. Stanley Wallach

hitting the target with a dart or at propelling a small auto so that it will stop on the number he has previously selected.

"* * * In the auto game the contestant must select his number and then push the car on a track so that it hits both bumpers, located at the ends of the track and then have it stop on the number he has selected. When this is done, the contestant is awarded a basket of groceries, or a pair of pillow cases or some other prize. * * *"

Neither your letter nor the attached memorandum indicate whether a certain amount of money is required to be paid in advance to the attendant in charge of the automobile game by one desiring to play said game. However, from the statement of facts, it appears that said automobile game is to be one of the main attractions of the proposed picnic, and also since the proceeds from the concessions at the picnic are to be used for specified purposes, we assume that a certain sum of money must be paid in advance by all the persons who play said game.

The inquiry, in effect, is whether or not the game referred to in your letter and attached memorandum is a lottery, and in violation of the gambling laws of this State.

Before the operation of any device or game can be classified as a lottery, within the contemplation of the statutes governing lotteries, it is generally considered that three necessary elements must co-exist at the time such device or game is operated, namely, consideration, chance and prize. A detailed discussion of these elements, and whether or not in the instances referred to, the devices were lotteries within the meaning of the Missouri statutes is given in an official opinion of this department rendered to the Hon. Douglas W. Green, Prosecuting Attorney of Greene County, Missouri, on March 17, 1953. Said opinion is supported by some Supreme Court decisions which define and elaborate upon the subject of lotteries. The ruling of said opinion is in point, and is fully applicable to the present inquiry, therefore we enclose a copy of same for your consideration.

When we re-examine the description and manner of playing the game as given in the opinion request and memorandum, it is apparent that the operation of said game involves a consideration. Such

Hon. Stanley Wallach

consideration is the cash price paid in advance by the contestant for the privilege of playing said game.

It is obvious that chance plays a large part in the selection of the numbers and in causing the automobile to stop upon the numbers selected, and that the part played by skill is very small. No matter how skillful a player may be, if for some reason the automobile did not stop upon the number selected, according to the rules, he could not be awarded the prize, for only those who are lucky can win the prize, hence it appears that chance, rather than skill, is a determining factor in winning such prize. The memorandum, in reference to the conclusion of the game, that is, when a successful player causes the automobile to stop upon the number selected, specifically states: "When this is done, the contestant is awarded a basket of groceries or a pair of pillow cases or some other prize." Here we see that a prize is one of the elements in the playing of the game.

In view of the foregoing, it is our thought that the playing of the automobile game described in the opinion request and memorandum involves three elements necessary to constitute a lottery, namely, consideration, chance and prize; consequently, said game is a lottery within the meaning of Missouri lottery statutes, particularly Section 563.430 RSMo 1949, declaring the making or establishing of a lottery to be a crime.

CONCLUSION

It is the opinion of this department that a device called "Automobile Game," and consisting of a numbered rectangular track over which a small automobile is made to run is a game of chance rather than one of skill. That in consideration of the payment of a certain cash fee or price, paid in advance, one is permitted to operate or play said device or game. That such device is operated when the player first selects a number on the track and then propels the automobile over the track in such a manner that the automobile hits the bumpers at each end of said track. That it is only when the automobile stops upon the number previously selected is the operator awarded a prize. That the operation of said device involves the elements of consideration, chance, and prize, and is a lottery within the meaning of Missouri lottery statutes, particularly Section 563.430 RSMo 1949, which declares the making or establishing of a lottery to be a criminal offense.

Hon. Stanley Wallach

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General

PNC:am

Enc: Opn. Douglas W. Green
3-17-53

CRIMINAL LAW: Persons arrested without warrant may,
SUPREME COURT RULE 21.14: during the twenty-hour detention
period, apply to a judge or magistrate
of a court having original jurisdiction to try criminal offenses
in the county where such person is held for fixing of bail for
subsequent appearance in the same or another court.



August 9, 1954

Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Attention: L. L. Bornschein, Assistant Prosecuting Attorney

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"We would like your interpretation of
Rule 21.14, Rules of Criminal Procedure,
Missouri Supreme Court, with respect to
one arrested without warrant suspected
of a felony, being held within the Twenty
hour period (no charge being formally
filed). Can the subject detained, under
this rule, apply by request to a Magistrate
to set his bond for appearance at a desig-
nated time for his release (assuming the
offense is bailable) before the expiration
of the Twenty hours.

"Your opinion and interpretation hereon
will oblige."

Rule 21.14, Rules of Criminal Procedure of the Missouri
Supreme Court, to which you have referred, reads as follows:

"All persons arrested and held in custody
by any peace officer, without warrant, for

Honorable Stanley Wallach

the alleged commission of a criminal offense, or on suspicion thereof, shall be discharged from such custody within twenty hours from the time of arrest, unless they be held upon a warrant issued subsequent to such arrest. While so held in custody, every such person shall be permitted to consult with counsel or other persons in his behalf. If the offense for which such person is held in custody is bailable and the person held so requests, he may be admitted to bail in an amount deemed sufficient by a judge or magistrate of a court of such county or of the City of St. Louis having original jurisdiction to try criminal offenses. Such admission to bail shall be governed by all applicable provisions of these Rules. The condition of the bail bond shall be that the person so admitted to bail will appear at a time and place stipulated therein (which shall be a court having appropriate jurisdiction) and from time to time, as required by the court in which such bond is returnable, to answer to a complaint, indictment or information charging such offense as may be preferred against him." (Emphasis ours.)

It is noted that the quoted rule relates generally to the same subject matter as that found in Section 544.170 RSMo 1949. However, it will be noted that the rule incorporates a provision with respect to admittance to bail which is not found in the statute mentioned. We believe that the underscored portion of the rule clearly indicates that a person so detained may, if the offense be a bailable one, be admitted to bail prior to the expiration of the twenty-hour period. We believe that the wording leads to this conclusion, even though no formal charge had in fact been filed.

It is true that the rule uses the language in the second underscored portion "If the offense". It might be contended that the incorporation of this language must be construed to mean that the provisions relative to bail become operative only after the filing of a formal charge. We do not believe this position to be tenable. However, in view of the first underscored language wherein reference is made to persons

Honorable Stanley Wallach

held for the alleged commission of a criminal offense, or on suspicion thereof, we believe that the word "offense," as used in the second underscored portion of the rule, is to be construed following the language found in the first underscored portion.

We find that under appropriate statutes original jurisdiction of criminal offenses amounting to misdemeanors has been conferred upon magistrates in the County of St. Louis. Therefore, such courts are within the purview of the rule in that they are courts of the nature therein referred to. We think it therefore necessarily follows that application for admittance to bail may be made to a magistrate in such county as well as to a judge of the circuit court. Of course, the condition of the bail bond must comply with the further requirements of the rule quoted.

CONCLUSION

In the premises, we are of the opinion that a person arrested without warrant for the alleged commission of a criminal offense, or on suspicion thereof, may, prior to the expiration of the twenty-hour period referred to in Rule 21.14, Rules of Criminal Procedure, Missouri Supreme Court, apply to any judge of the circuit court or to any magistrate in the county wherein such person is detained for admittance to bail, provided that the offense for which such person is detained is a bailable one.

We are further of the opinion that in the event such person is let to bail, the condition of the bail bond must require that the person so admitted will appear at a definite time and place before a court of appropriate jurisdiction, and shall further attend such court from time to time, as may be required by such court, to answer any complaint, indictment or information which may be filed therein charging such person with a criminal offense.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

STATE HIGHWAY PATROL: Superintendent may assign patrolman to Capitol grounds and may arrest for violations of law observed by him.

*Capitol Bldg
grounds*



September 29, 1954

Col. Hugh H. Waggoner
Superintendent
State Highway Patrol
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this office on the following questions:

1. May a member of the Missouri State Highway Patrol be assigned by the Superintendent to patrol the streets on the State Capitol grounds and to direct traffic on such streets?
2. If such assignment may be made, what is the extent of the authority of the patrolman to make arrests in connection with his duties?

You have informed us that the request for the assignment by you of a member of the Patrol to patrol the streets on the State Capitol grounds was made by unanimous action of the Board of Public Buildings consisting of the Governor, Lieutenant Governor and Attorney General. Under Section 8.010, RSMo 1949, that Board has "general supervision and charge of the public property of the state at the seat of government."

Section 8.030, RSMo 1949, provides:

"The director of public buildings, with the approval of the board of public buildings, may employ and remove such assistants, engineers, clerks, janitors, watchmen and other employees as the work of the division may require and fix their compensation within the limits of the appropriation. Each watchman so employed, before entering on his duties, shall take and subscribe an oath of office to perform his duties faithfully and impartially, and shall be given a certificate of appointment, a copy of

Col. Hugh H. Waggoner

which shall be filed with the secretary of state, granting him the same powers now held by other peace officers to maintain order, preserve the peace and make arrests in the capitol buildings and on the grounds thereof."

Although the afore-mentioned statutes give the Board of Public Buildings supervision and control of the Capitol and Capitol grounds and provide for the appointment of watchmen to maintain order, preserve peace and make arrests on the Capitol grounds, it does not appear to have been the legislative intent in enacting such laws to make such authority exclusive in such officers.

Turning to the authority of the State Highway Patrol, that body and its members are creatures of statute and have only such authority as granted by the Legislature and necessary implied authority to carry out that expressed. Section 43.020, RSMo 1949. See State ex rel. Laundry, Inc., v. Public Service Comm., 327 Mo. 93, 34 S.W. (2d) 37; State ex rel. Crown Coach Co. v. Public Service Comm., 239 Mo. App. 198, 185 S.W. (2d) 347. Section 43.180, RSMo 1949, provides:

"The members of the state highway patrol, with the exception of the director of radio and radio personnel, shall have full power and authority as now or hereafter vested by law in peace officers when working with and at the special request of the sheriff of any county, or the chief of police of any city, or under the direction of the superintendent of the state highway patrol, or in the arrest of anyone violating any law in their presence or in the apprehension and arrest of any fugitive from justice on any felony violation. The members of the state highway patrol shall have full power and authority to make investigations connected with any crime of any nature. The expense for the patrol's operation under this section shall be paid monthly by the state treasurer chargeable to the general revenue fund, provided, however, the amount appropriated from the general revenue fund shall not exceed ten per cent of the total amount appropriated for the Missouri state highway patrol."

Col. Hugh H. Waggoner

Under the authority of the first sentence of such section it appears that at the direction of the Superintendent of the State Highway Patrol members thereof may be directed to act in a very broad field of authority. This office, in opinions written to Honorable Forrest C. Donnell on August 21, 1941 and September 19, 1941, held that the Highway Patrol had no authority over city streets, county roads, fairs, picnics, etc. However, the present Section 43.180 was not in effect at that time; it was enacted in 1943 (Laws of Missouri, 1943, page 652). It may well be that such section was enacted as a result of the two opinions rendered to Governor Donnell limiting the power of the Highway Patrol to highways maintained by the State Highway Commission. It also appears from a reading of Section 43.180 that the Legislature contemplated by that section the imposition of duties other than patrolling of the highways maintained by the State Highway Commission, inasmuch as the last sentence of that section limits the amount of money which may be expended for such activities to ten per cent of the total amount of Highway Patrol appropriation.

In view of the provisions of Section 43.180, it appears to us that the Superintendent of the Patrol would be authorized to assign patrolmen to patrol the State Capitol grounds.

As for your second question, Section 43.170, RSMo 1949, provides:

"It shall be the duty of the operator or driver of any vehicle or the rider of any animal traveling on the highways of this state to stop on signal of any member of the patrol and to obey any other reasonable signal or direction of such member of the patrol given in directing the movement of traffic on the highways. Any person who willfully fails or refuses to obey such signals or directions or who willfully resists or opposes a member of the patrol in the proper discharge of his duties shall be guilty of a misdemeanor and on conviction thereof shall be punished as provided by law for such offenses."

Since it is presumed that in performing his duty on the Capitol grounds a trooper assigned thereto will be acting under the direction of the Superintendent of the Highway Patrol, he will, under the provisions of Section 43.180, quoted above, have full power and authority as is now or may hereafter be vested by law in police officers.

Col. Hugh H. Waggoner

In connection with the provisions of Section 43.170, supra, it may be pointed out that the word "highway" has generally been interpreted by the courts of this state and others to include streets in towns. In *O'Brien v. Burroughs Adding Machine Co.*, 191 Mo. App. 501, 177 S.W. 811, the court held that a public alley was a highway for all travel and any traveler injured thereon was an invitee and not a trespasser. In *Phillips v. Henson*, 326 Mo. 282, 30 S.W. (2d) 1065, 1068, the court held that a street was a highway in a statute requiring a motorist to use it with the highest degree of care. In *Mullen v. Fayette*, 274 App. Div. 527, 85 N.Y.S. (2d) 64, the court held that a street in a governmental reservation owned by the United States government and open to the public generally for passage was considered a highway. See also *Herbert v. City of Richland Center*, 264 Wisc. 8, 58 N.W. (2d) 461.

We also call attention to the provisions of Section 43.190, RSMo 1949. That section provides as follows:

"The members of the patrol, with the exception of the director of radio and radio personnel, are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of this state. When a member of the patrol is in pursuit of a violator or suspected violator and is unable to arrest such violator or suspected violator within the limits of the district or territory over which the jurisdiction of such member of the patrol extends, he shall be and is hereby authorized to continue in pursuit of such violator or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such violator or suspected violator wherever he may be overtaken."

Col. Hugh H. Waggoner

Under the provisions of that section we are of the opinion that a patrolman assigned to the Capitol would have authority to arrest without warrant any person detected by him in the act of violating any laws of this state.

CONCLUSION

Therefore, it is the opinion of this office that:

1. The Superintendent of the Missouri State Highway Patrol may assign a member of the Patrol to patrol the streets in the State Capitol grounds and to direct traffic on such streets;

2. Such patrolman would have authority to make arrests for any person detected by him while on such assignment in the act of violating any laws of this state, including Section 43.170, RSMo 1949, which requires an operator of a motor vehicle to obey any reasonable signal or direction of a member of the State Highway Patrol in directing traffic.

Respectfully submitted,

JOHN M. DALTON
Attorney General

RRW:ml

INTERSTATE COMMERCE:
MOTOR VEHICLES:
RECIPROCITY:

- (1) Motor carrier operating in described fashion is engaged in "interstate commerce."
- (2) Reciprocity for commercial motor vehicle registration between states of Missouri and Delaware.



October 4, 1954

Honorable Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"The Frisco Transportation Company, a Delaware Corporation, operates trucks bearing Oklahoma license plates between Missouri and Oklahoma. On part of their operation, they pick up freight and merchandise at Springfield, Missouri and transport it to Joplin, Missouri. This freight and merchandise is shipped into Springfield from other states on the Saint Louis - San Francisco Railroad, which is a Missouri corporation. The freight moved from Springfield to Joplin is usually only part of the load on the truck and the remainder of the load is delivered to points in Oklahoma.

"The State of Oklahoma does not grant reciprocity on license plates to Missouri residents whose trucks are engaged in intra-state transportation in Oklahoma and, therefore, Missouri does not grant reciprocity to Oklahoma residents under similar circumstances.

"It is respectfully requested that you advise us whether or not in your opinion the transportation of freight from Springfield, Missouri to Joplin, Missouri is an intra-state operation even though

Hon. Hugh H. Waggoner

the freight is being moved in interstate commerce by means of the Saint Louis - San Francisco Railroad and the Frisco Transportation Company."

From the facts disclosed in your letter of inquiry it is apparent that the merchandise being transported is moving continuously from the consignor to the consignee. The mere fact that two or more connecting lines or methods of transportation are employed in such movement does not destroy the interstate commerce character thereof. There are numerous cases so holding. We direct your attention to the Daniel Ball case, reported 77 U.S. 557, 19 L. Ed. 999, from which we quote:

"* * * In this case it is admitted that the steamer was engaged in shipping and transporting, down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through

Hon. Hugh H. Waggoner

two or more States, does in no respect affect the character of the transaction. * * "

We believe the conclusion inescapable that the carriage provided by the Frisco Transportation Company as described in your letter of inquiry is an integral part of transportation in "interstate commerce."

However, we note further from your inquiry that your primary concern seems to be that of registration requirements of the motor vehicles so engaged. We therefore have extended our research into the law applicable and make the following observations which we consider pertinent to the registration of such motor vehicles.

We direct your attention to the provisions of Section 301.270, RSMo 1949, which is the Missouri Motor Vehicle Registration Reciprocity Statute. It reads as follows:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

It will be observed that the statute is by its terms applicable to owners referred to as being "non-resident" or "resident." It is true that the term "resident" is not ordinarily nor technically synonymous with the term "domiciled." The first connotes a more or less temporary physical presence at some geographical location, not necessarily coupled with an intent to remain permanently. Such a "residence" may be acquired in

Hon. Hugh H. Waggoner

connection with the discharge of official duties, engaging in business or for purely personal reasons. The latter term ordinarily refers to a permanent place of abode with respect to which a person at all times has an intent to return although such return may be in the future. However, in the statute quoted it is our thought that the words "non-resident", "resident" and "residence" are used in the sense of being synonymous with the word "domicile." Such similarity of meaning has been employed by the appellate courts in the construction of other statutes in which similar language is employed. Such terminology is so construed in actions relating to divorce, (Sasala v. Sassie, 249 P. 2d 380, 41 Wash. 2d 363); taxation (McIntosh v. Maricopa County 241 P. 2d 801, 73 Ariz. 366, 31 A.L.R. 2d 770); right of franchise (Mitchell v. Delaware State Tax Commission, 42 Atl. 2d 19, 3 Terry 589) and probate matters (In re Eisenberg's Estate, 31 NYS 2d 380, 177 Misc. 655). A complete discussion of such construction appears in State ex rel. Sathere v. Moodie, 258 NW 558, 65 N.D. 340.

We have dwelt at some length upon the construction to be given Section 301.270, RSMo 1949, for the reason that in your letter of inquiry you have stated that the Frisco Transportation Company is a Delaware Corporation. It therefore is ordinarily to be treated as having its domicile in the state of its incorporation. It is also true that by compliance with the laws of another state and by engaging in the conduct of its business therein a corporation may become for many purposes a "resident" of a state other than that of its incorporation.

However, we think, that as stated above, the word "residence" as used in the statute quoted, is synonymous with "domicile" as any other construction placed upon such statute could render it ambiguous and lead to absurdities. A single illustration will disclose how such result might be reached. Assume that a corporation chartered by the State of Delaware was lawfully engaged in the transportation by motor vehicle of commodities in ten other states. Further assume that such corporation thereby became a "resident" of each of such other ten states. It is readily apparent that no guide would, in such circumstances, be supplied by the statute under consideration in determining the reciprocity which should be granted the motor vehicles of such corporation should its operations be extended into the State of Missouri.

In the case of Western Express Company vs. Wallaca, 144 Ohio State 612, the Court held that a corporation, insofar as the motor vehicle reciprocity laws are concerned, can be a resident only of the state in which it is incorporated. However, the courts have considered that a corporation may become

Hon. Hugh H. Waggoner

a resident of more than one state for some purposes. In the case of *Morse vs. Lash Motor Company (Conn.)*, 139 Atl. 637, 1. c. 638, the Court stated:

"For the purpose pertaining to registration of motor vehicles a person may be a resident of more than one state."

That case involved an individual rather than a corporation, and the conclusion was based upon a Connecticut statute which defined a non-resident as a person having no regular place of abode or business in the state for a longer period than fifteen days in each year. However, as above pointed out, it appears that to apply the doctrine of multiple residence to a corporation engaged in business in Missouri would afford no standard for determination by law enforcement officials of whether or not a vehicle should be registered in this state. Certainly, the choice of place of registration of a vehicle employed in numerous states should not be a matter solely for the owner.

The Frisco Transportation Company is qualified to do business in Missouri, and it appears to us that under the multiple residence doctrine, if it becomes a resident of Oklahoma by qualifying and doing business there, it would likewise become a resident of Missouri and would not, in any event, be entitled to the benefits of our reciprocity statute. Such a conclusion was reached in the case of *Gondek vs. Gudahay Packing Company*, 233 Mass. 105, 123 N. E. 398.

Moreover, the Missouri Motor Vehicle Registration fee is a tax imposed for the privilege of operating vehicles on the highways of the state. *State ex rel. McClung vs. Becker*, 288 Mo. 607, 233 S. W. 54. The reciprocity provision is in effect an exemption from such tax in favor of non-residents. The State of Missouri has a right to impose a tax for the use of its highways on residents and non-residents alike. The fact that a vehicle is engaged in interstate commerce is no bar to the right of the State of Missouri to impose a tax upon its owner for the privilege of using the highways of this state. 25 A. L.R. 37, 52 A.L.R. 533. Therefore, the reciprocity privilege being in effect an exemption from tax, it should be strictly construed. Strict construction would result in the determination of the place of residence of a corporation in accordance with the strict legal principles set out above for the determination of such question, and such strict principles necessarily make Delaware the residence of the corporation in question.

Hon. Hugh H. Waggoner

In view of the foregoing, the laws of Delaware would determine, provided that the vehicle was properly registered there, the reciprocal privileges of the operator in Missouri. Delaware statutes do provide reciprocity in certain circumstances. Delaware Code Ann., par. 2112 (a) (d). However, the information that you have given indicates that the vehicle in question has not been registered in Delaware and, therefore, there could be no reciprocity provision extended to it under the Missouri law, and registration in Missouri would be required.

CONCLUSION

Therefore, it is the opinion of this office that a motor vehicle owned by a corporation organized under the laws of Delaware and registered and licensed in the State of Oklahoma, which operates on the highways of the State of Missouri, is entitled to reciprocity under the Missouri statute only if duly registered and licensed in the State of Delaware, and only to the extent that similar privileges are granted to Missouri owners by Delaware, and that if such vehicle is not registered and licensed in Delaware, it would not be entitled to operate in the State of Missouri without having been registered and licensed in Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

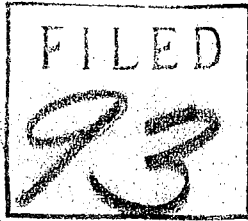
Very truly yours,

JOHN M. DALTON
Attorney General

RRW:DA

HIGHWAY PATROLMEN:
ARREST:
MOTOR VEHICLES:

A highway patrolman may arrest without warrant a person who the patrolman, at the direction of the director of revenue, calls upon to surrender his motor vehicle registration and license, if the highway patrolman can determine as of that time that such person is willfully failing to turn in to the director of revenue his motor vehicle registration and license.



November 29, 1954

Colonel Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Section 303.330, R. S. Mo.-1945, authorizes the Director of Revenue of Missouri to direct the Missouri State Highway Patrol or any peace officer to secure possession of and return to the Director, the license and/or registration of any person who, after being suspended under the Safety Responsibility Law, shall fail to immediately return his license and/or registration to the Director upon request.

"The Director of Revenue uses a department form known as a 'Police Demand Order' to direct the Patrol and other police agencies to pick licenses up under this Section. A copy of this form is attached.

"We would appreciate an official opinion as to whether or not a member of the Patrol who is attempting to serve a 'Police Demand Order' has the authority to arrest, without warrant, persons who refuse to surrender their license and/or registrations.

"We will welcome an early reply as we would like to discuss this matter at a retraining school for the Department which will begin September 13."

Colonel Hugh H. Waggoner

Section 303.330 MoRS Cum. Supp. 1953 (of the laws of 1953 and not 1945, as stated in your letter) reads:

"Any person whose license or registration shall have been suspended as herein provided, or whose policy of insurance or bond, when required under this chapter, shall have been canceled or terminated, or who shall neglect to furnish other proof upon request of the director shall immediately return his license and registration to the director. If any person shall fail to return to the director the license or registration as provided herein, the director shall forthwith direct the Missouri state highway patrol or any peace officer to secure possession thereof and return the same to the director."

Paragraph 4 of Section 303.370, MoRS Cum. Supp. 1953, reads:

"Any person willfully failing to return his license or registration as required in section 303.330 shall be fined not more than five hundred dollars or imprisoned not to exceed thirty days, or both."

From the above we see that it is the law of this state that when a situation arises such as is set forth in Section 303.330, supra, the person involved shall "immediately return his license and registration to the director." A failure to do this is, by paragraph 4 of Section 303.370, supra, made a misdemeanor. We also note that by Section 303.330, supra, in a situation where a person who should have returned to the Director of Revenue his license and registration fails to do so, the director shall direct the Highway Patrol (or any peace officer) to secure possession of the registration and license, and return them to him (the director).

We now direct attention to Section 43.190 RSMo 1949, which reads:

"The members of the patrol, with the exception of the director of radio and radio personnel, are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. The

Colonel Hugh H. Waggoner

members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of this state. When a member of the patrol is in pursuit of a violator or suspected violator and is unable to arrest such violator or suspected violator within the limits of the district or territory over which the jurisdiction of such member of the patrol extends, he shall be and is hereby authorized to continue in pursuit of such violator or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such violator or suspected violator whenever he may be overtaken."

The above gives in general terms to members of the Highway Patrol all of the powers of arrest which are possessed by peace officers. In more specific terms it gives to members of the Highway Patrol powers to arrest, without a warrant, any person "detected" by them in the act of violating "any" law of this state. This would certainly include the violation of a law, the violation of which was a misdemeanor, which, as we have noted above, is the punishment fixed for the violation of Section 303.330, supra.

We now direct attention to the case of State v. Collins, 172 S. W. (2d) 284, at l. c. 291, the court, in its opinion, stated:

"Except for situations where the right is specially given by statute, a peace officer has no authority, without a warrant, to arrest a person charged with the commission of a misdemeanor unless the offense was committed in the officer's presence. Greaves v. Kansas City Junior Orpheum Co., 229 Mo. App. 663, 80 S. W. (2d) 228; Wehmeyer v. Mulvihill, 150 Mo. App. 197, 130 S. W. 681. The offense of which relator was suspected was of course a misdemeanor - the crime of petit larceny growing out of the theft of

Colonel Hugh H. Waggoner

a grease gun shown to have been worth from twelve to fifteen dollars. Sec. 4469, R.S. Mo. 1939, Mo. R.S.A. Sec. 4469. Moreover, the offense, if any, was not committed in Collins' presence so as to have dispensed with the necessity that he have a warrant as his authority for making the arrest."

We believe that the above represents the law.

Upon the basis of the above, it is our opinion that, if when a highway patrolman, at the direction of the director of revenue, calls upon a person to surrender his motor vehicle registration and license, the highway patrolman may arrest such person, without warrant, if he, the patrolman, can determine that such person is willfully failing as of that time to turn in to the director of revenue his registration and license.

CONCLUSION

It is the opinion of this department that a highway patrolman may arrest, without warrant, a person who the patrolman, at the direction of the director of revenue, calls upon to surrender his motor vehicle registration and license, if the highway patrolman can determine as of that time that such person is willfully failing to turn in to the director of revenue his motor vehicle registration and license.

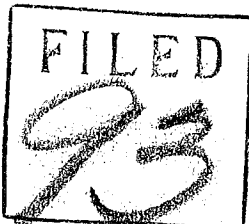
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW:ld:da

ELECTIONS: Tie vote for candidates for nomination to be
NOMINATIONS: determined by lot by canvassers of returns of
election.



December 15, 1954

Hon. Wayne W. Waldo
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"The opinion of the Attorney General is
respectfully requested on the following
situation:

"Mr. Guy Reed and Mr. Chris C. Cole were
candidates for the nomination on the
democratic ticket for the office of Pre-
siding Judge of Pulaski County, Missouri.
After all ballots were counted in the
democratic primary on August 3, 1954, Mr.
Reed and Mr. Cole each received an equal
number of votes. Mr. Reed and Mr. Cole
were the only candidates for the democratic
nomination. The tie vote was resolved by
placing the name of Mr. Reed in one envel-
ope, the name of Mr. Cole in another envel-
ope, and placing both envelopes in a box,
and having a child draw one envelope con-
taining a name from the box. The name of
Mr. Guy Reed was drawn from the box and he
was declared the winner and was placed on
the ballot in the General Election as the
democratic nominee.

"Before the name of Mr. Reed was selected
as above outlined, Mr. Cole objected to
selecting the nominee in such a manner on
the basis that it was gambling. Mr. Cole
still objects on the same basis."

Hon. Wayne W. Waldo

"The opinion of the Attorney General is respectfully requested as to whether the above outlined procedure constitutes a valid nomination of Mr. Reed to the office of Presiding Judge of the County Court of Pulaski County, Missouri, in view of the fact that Mr. Cole objected to the selection on the grounds that it was gambling.

"The selection of Mr. Reeds name was made by lot, by the County Clerk and the canvassers of the election, as provided by Section 120-520 MRS, 1949."

Section 120.520 RSMo 1949 is found as a portion of the chapter relating to nominations by primary elections. It reads as follows:

"In case of a tie vote, the tie shall forthwith be determined by lot by the canvassers."

From the facts stated in your letter of inquiry, it appears that the selection of the nominee was made in accordance with the provisions of this statute.

CONCLUSION

In the premises, we are of the opinion that a tie vote for candidates for nomination at a primary election is to be determined by lot by the canvassers of the returns of such primary election.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

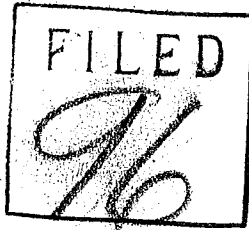
Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

SCHOOLS: School district temporarily combined with another district under Sec. 161.100, RSMo 1949, must employ teacher and show kind of certificate held by teacher in order to qualify for maximum apportionment of state school money.

SCHOOL DISTRICTS:



February 4, 1954

Honorable Hubert Wheeler
Commissioner, Department of Education
Jefferson City, Missouri

Dear Mr. Wheeler:

This is in response to your request for an opinion received in this office on December 30, 1953, which reads, in part, as follows:

"In the temporary combination of school districts as provided in section 161.100, RSMo 1949, is it necessary for the school board of the sending district to employ a teacher and show the kind of certificate held in order to qualify for the maximum apportionment of state school money?"

The section which provides for temporary combination of school districts is 161.100, RSMo 1949, which reads as follows:

"Two or more districts may combine temporarily for educational purposes should the school boards of all districts concerned agree to transport the pupils of one or more districts to a schoolhouse elsewhere, and such districts shall receive the same apportionment from the state school fund as they would otherwise have received, and may use such funds, or any part thereof, in transporting pupils; provided further, that in such temporary combinations the record of daily attendance of pupils from each district shall be kept separate, and credited to their respective districts, as a basis for future apportionments."

Honorable Hubert Wheeler

It is pertinent to note that under that section school districts making a temporary combination with another receiving district shall receive the same apportionment from the state school funds as they would have otherwise received and that the daily attendance of pupils shall be kept separate and credited to their respective districts as a basis for future apportionments.

The school laws define and establish the basis for the state school moneys. Section 161.020, RSMo 1949, defines the teaching unit as a basis for the apportionment of school moneys and provides, in part, that the previous year's attendance shall not exceed the number of teachers employed. Section 161.030, RSMo 1949, requires the apportionment of state school money and provides that "no teacher * * * who is not paid by the school board from public funds of the district shall be counted." This law, in Subsection 2 thereof, further provides for the reporting of the number of teachers employed, the salary of the teacher and any other information that may be required by the State Board of Education. Section 161.040, RSMo 1949, provides for the basic apportionment of state school moneys determined on teaching unit guarantees or amounts. Pursuant to Section 161.030, Subsection 2, supra, the State Board of Education has required that the district indicate that a teacher has been employed by the sending district and that it report the kind of certificate held by the teacher and the salary agreement in order to qualify for the maximum apportionments.

In order to establish a teaching unit and to determine the amount for the apportionment under Section 161.040, supra, a teacher must be employed by the district and the kind of teaching certificate held indicated. Without such compliance there would be no way to calculate the amount of school money due the district.

In State ex rel. Worsham v. Ellis, 329 Mo. 124, 44 S.W. (2d) 129, 130, the court said:

" * * * But, answering this objection directly, the statutes seem to contemplate that a teacher be employed by contract before a school district can apply for state aid. * * *"

Therefore, we believe it is clear that under a temporary combination of school districts as provided in Section 161.100, supra, it is necessary for the sending district to employ a

Honorable Hubert Wheeler

teacher by contract and under the reporting requirement of the State Board of Education to show the kind of certificate held by the teacher in order for the district to qualify for the maximum apportionment of state school money.

CONCLUSION

It is the opinion of this office that when a district combines temporarily with another school district as provided in Section 161.100, RSMo 1949, and transports its pupils to a schoolhouse in another district, it is necessary for the school board of the sending district to employ a teacher and show the kind of certificate held by the teacher in order that the sending district qualify for the maximum apportionment of state school money.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

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FEES: County highway engineers of counties of first
HIGHWAY ENGINEERS: class are entitled to an annual salary of
PUBLIC OFFICERS: \$8,000.00; county highway engineers of
SALARIES: counties of the second class are entitled
to an annual salary, to be fixed by the county
court, of not more than \$4,000.00; and county
highway engineers of counties of the third and fourth classes
shall receive as compensation an amount fixed by the county court,
not to exceed ten dollars per day in counties of the third class,
and not more than \$8.00 in counties of the fourth class for each
day actually served as county highway engineer.



March 5, 1954

Honorable James J. Wheeler
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Sir:

Your letter of January 18th, 1954, requesting an
official opinion reads, in part, as follows:

"* * * We will appreciate it very
much if your office will furnish an
opinion on whether or not a county
highway engineer can receive extra
compensation over the amount set by
Statute as regular salary for the work
they do on the King Bill Program and
the State Aid King Bill Maintenance
Program. Also, in township organization
counties, such as Chariton, where the
townships have full control of the
road construction and maintenance, and
the county engineer's duties are strictly
on maintenance and construction of bridges
and culverts, can the county engineer re-
ceive additional pay over and above the
salary set by Statute for the work he
does on the King Bill Maintenance Program?"

County highway engineers in class one counties are pro-
vided for by Section 61.010, RSMo 1949, as follows:

Honorable James J. Wheeler

"In all counties of class one in this state there is hereby created the office of county highway engineer and surveyor, to be known and designated as 'highway engineer,' who shall be the chief officer in such county in all matters pertaining to highways, roads, bridges, culverts and surveys. At the general election in the year 1948, and every four years thereafter, the qualified voters of each such county shall elect a highway engineer, who shall hold his office for four years and until his successor is elected, commissioned and qualified."

The salary of the highway engineers of class one counties is provided by Section 61.050:

"In all counties of class one, the county highway engineer shall receive as total compensation for all services performed by him an annual salary of eight thousand dollars."

The appointment of county highway engineers in counties of classes two, three and four are authorized by Section 61.160, MoRS 1949, Cumulative Supplement, 1953, (House Bill No. 339 of the 67th General Assembly):

"The county courts of each county in this state in classes two, three and four are hereby authorized and empowered to appoint and reappoint a highway engineer within and for their respective counties at any regular meeting, for such length of time as may be deemed advisable in the judgment of the court. The provisions of sections 61.170 to 61.310 shall apply only to counties of classes two, three and four."

Section 61.190 MoRS 1949, Cumulative Supplement, 1953, (House Bill No. 339 of the 67th General Assembly) provides for the salary of county highway engineers of class two, three and four counties:

Honorable James J. Wheeler

"1. In all counties of the second class the county highway engineer shall receive an annual salary, to be fixed by the county court, of not to exceed four thousand dollars, payable monthly out of the county treasury.

"2. In all counties of the third and fourth class the county highway engineer shall receive as compensation an amount fixed by the county court, for each day he shall actually serve as county highway engineer. The amount so fixed shall not exceed ten dollars per day in counties of class three nor eight dollars per day in counties of class four. All such compensation shall be payable monthly out of the county treasury."

Your request, in essence, asks if a county court can pay to a county highway engineer salary more than that authorized by the above-quoted compensation statutes. The Supreme Court of Missouri in *Nodaway County v. Kidder*, 344 Mo. 795, 129 S.W. (2d) 857, laid down the general rule concerning compensation of public officers, i.e. 860:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. *State ex rel. Evans v. Gordon*, 245 Mo. 12, 28, 149 S.W. 638; *King v. Riverland Levee Dist.*, 218 Mo. App. 490, 493, 279 S.W. 195, 196; *State ex rel. Wedeking v. McCracken*, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute

Honorable James J. Wheeler

authorizing such payment. State ex rel.
Buder v. Hackmann, 305 Mo. 342, 265 S.W.
532, 534; State ex rel. Linn County v.
Adams, 172 Mo. 1, 7, 72 S.W. 655;
Williams v. Chariton County, 85 Mo. 645."

Applying the rule laid down in the Nodaway County case, we must hold that county highway engineers claiming compensation for their services must point out the statute authorizing such compensation. The only statutes authorizing compensation to said highway engineers are Sections 61.050, 61.190, both quoted above. It must further be borne in mind that the 67th General Assembly considered the salaries of county highway engineers. Therefore, we must conclude that this recent action by the General Assembly indicates that said General Assembly, in its wisdom, decided that county highway engineers should receive no more than the amounts specified by statute.

CONCLUSION

It is, therefore, the opinion of this office that county highway engineers of counties of the first class are entitled to an annual salary of \$8,000.00; county highway engineers of counties of the second class are entitled to an annual salary, to be fixed by the county court of not more than \$4,000.00; and that county highway engineers of counties of the third and fourth class shall receive as compensation an amount fixed by the county court, not to exceed ten dollars per day in counties of the third class, and eight dollars per day in counties of the fourth class, for each day actually served as county highway engineer.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul McGhee.

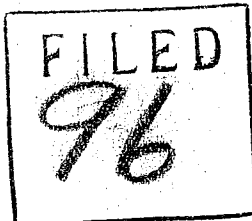
Yours very truly,

JOHN M. DALTON
Attorney General

PMcG:vlw

COURTS: FINES:
CRIMINAL LAW:
MAGISTRATE COURT:
PROSECUTING ATTORNEY:

Prosecuting attorney may dismiss an affidavit filed by him charging a person with the commission of a crime in another state, and that said person has fled therefrom. Fines assessed in magistrate court are judgments which may be collected, unless barred by Section 516.350, RSMo 1949.



April 19, 1954

Honorable W. C. Whitlow
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

By letter dated January 26th, 1954, you requested an official opinion, as follows:

"I have two problems regarding procedure in the Magistrate Court which I would like to get straightened out and which I have been unable to do on my own research.

"At the request of the State of Wisconsin, back in March of 1953, we filed an affidavit against one Rolla Giboney for removing mortgaged property from the State of Wisconsin and held him under arrest for extradition. He was taken into custody and eventually returned to Wisconsin, but as I understand it, he returned voluntarily and not under the extradition requisition.

"The case is still pending in our Magistrate Court and since it is of no further use, I would like to get it off of the record. Is dismissal the proper procedure to dispose of this matter or since he was taken into custody under the charge filed, should the record show that the case has been disposed of? Unless we can properly dispose of it, it would seem that it would lay here until the end of time.

Honorable W. C. Whitlow

"We also have a great many cases in our files in which fines have been assessed, generally upon a plea of guilty by the defendant. These fines, however, have not been paid, generally because the court has given the defendant time in which to make payment. There are cases in the files at this time showing unpaid balances that are at least two and some of them three and four years old. As I interpret the statutes, any unpaid fine cannot be collected if it is not collected within one year of the date of assessment. What record should be made on these cases in order to close them?
* * *

We presume that the affidavit filed in March of 1953 was under authority of Section 548.060, which at that time read as follows:

"Whenever any person within this state shall be charged, on the oath or affirmation of any credible witness, before any judge or magistrate of a court of record, except judge of the probate court, with the commission of any crime in any other state or territory of the United States, and that he fled from justice, it shall be lawful for the judge or magistrate to issue his warrant for the apprehension of the party charged."

This section was amended by the 67th General Assembly subsequent to the time in question, but that amendment will not be here discussed. We gather from your letter that you, as prosecuting attorney, filed the affidavit. Prosecuting attorneys in the state of Missouri are given wide discretion in discontinuing or dismissing prosecutions. The extent of such discretion vested in prosecuting attorneys is discussed at length in *State ex rel. Griffin v. Smith*, 258 S.W. (2d) 590. At l.c. 593, the Supreme Court by Conkling, C.J., made this observation:

"It is clearly the weight of authority that if there is no statute respecting the right to enter a nolle prosequi (and

Honorable W. C. Whitlow

there is no such statute in Missouri) that such right lies within the sole discretion of the prosecuting attorney. 14 Am. Jur. Criminal Law, Sec. 296, p. 967, 22 C.J.S. Criminal Law, Sec. 457, page 707. This court stated that principle in State on Inf. of McKittrick v. Graves, 346 Mo. 990, 144 S.W. 2d 91, 95, wherein we said: 'Hence they (the dismissals made by a prosecuting attorney of certain criminal cases) lay within his discretion under the power of nolle prosequi which the law vests in the prosecuting officer in the absence of a statute on the subject. 14 American Jurisprudence 967.' See also Ex parte Claunch, 71 Mo. 233.

"In State ex rel. Thrash v. Lamb, Judge, supra, the question now before us was squarely ruled in these words: 'A prosecuting attorney has discretionary power to institute or discontinue prosecutions. * * *'"

Thus, we conclude that you, in your discretion, may dismiss the affidavit filed against Rolla Giboney, mentioned in your letter.

We turn now to your second question as to the disposition of criminal cases in the magistrate court in which assessed fines have not been paid.

A magistrate may stay the execution of a sentence, but may not commute it (see enclosed opinion of this office to Honorable Frank W. May, Prosecuting Attorney of St. Francois County, dated March 31, 1953).

Provision for collection of fines in magistrate courts is made by Section 543.260, RSMo 1949, as follows:

"Whenever the defendant shall be tried and found guilty, either by the magistrate or a jury, or shall enter a plea of guilty, and a fine shall be assessed, the magistrate

Honorable W. C. Whitlow

shall enter judgment against the defendant for such fine, and if the punishment shall be imprisonment in the county jail or shall be both a fine and imprisonment, the magistrate shall enter judgment according to the finding of the court or verdict of the jury, and immediately commit the defendant to the county jail for the time designated in the judgment, and the defendant shall be adjudged to pay the costs, and may be committed to the county jail until the judgment for both fine and costs shall be paid, or until he shall be discharged therefrom under the provisions of section 543.270."

The Springfield Court of Appeals in Hicks v. McCown, 144 Mo. App. 544, l.c. 547, made this statement about this section:

"This section contemplates a judgment for fine or costs and its meaning is unmistakable."

Section 516.350 is the statute of limitations on judgments:

"Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants thereon, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process

Honorable W. C. Whitlow

shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever."

The above limitation is made applicable to the state by Section 516.360, RSMo 1949. Since the assessment of a fine by a magistrate is a judgment, and the magistrate court is a court of record, Section 516.350 covers the present situation.

CONCLUSION

It is, therefore, the opinion of this office, that a prosecuting attorney may dismiss an affidavit filed by him charging a person with the commission of a crime in another state, and that said person has fled therefrom. Fines assessed in magistrate court are judgments which may be collected, unless barred by Section 516.350, RSMo 1949.

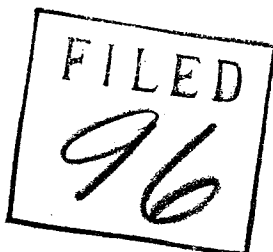
The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:vlw

ROADS AND BRIDGES: Bridge constructed by special road district remains property of such district upon abandonment of public road whereon situated.



May 28, 1954

Mr. W. C. Whitlow
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"A disagreement has arisen regarding 'title' to a bridge on a public road in Callaway County; both the County and the special road district claim the bridge.

"The bridge is located in a special road district and was constructed by the special road district. The section of road upon which the bridge is situated is being abandoned in favor of a new location nearby. The relocation is being paid for by the State Highway Department, since the road is now under their supervision and maintenance. Both the County and the special road district have other locations where the bridge can be used and both now claim 'title' to the bridge.

* * * *

"Will you please give me your opinion regarding who owns this bridge?"

For the purpose of this opinion, we have assumed that all of the funds used to "construct" the bridge arose from sources within the district; if this is not in fact true, a possible different conclusion might be reached.

Provision for the incorporation of three distinct types of "special road districts" has been made under Missouri law. The applicable statutes are found in Chapter 233, RSMo 1949. We note that Callaway County is one not under township organization and, therefore, the provisions of Sections 233.320 to 233.445, inclusive, are inapplicable. In your letter of inquiry you have not indicated whether the special road district to which reference is made is a "city or town road district" referred to in Sections 233.010 to 233.165, RSMo 1949, inclusive, or a "special road district--benefit assessment--counties not under township organization" type as governed by Sections 233.170 to 233.315, RSMo 1949, inclusive. However, because of a similarity in statutory authority granted to each of these two types of road districts we do not consider it necessary to determine the exact form of organization.

Your attention is first directed to Section 233.115, RSMo 1949, reading as follows:

"Said board may, by contract or otherwise, under such regulations as the board shall prescribe, build, repair and maintain, or cause to be built, repaired, or maintained all bridges and culverts needed within said district; provided, however, that the county court of the county in which said special road district is located may, in its discretion, out of the funds available to it for that purpose, construct, maintain, or repair, any bridge, or bridges, or culvert or culverts in such road district, or districts, or it may, in its discretion, appropriate out of the funds available for that purpose money to aid and assist the commissioners of said special road district, or districts, which shall be expended by the commissioners of said special road district, or districts, as above provided."

Your attention is also directed to a portion of Section 233.190, RSMo 1949, reading as follows:

* * * * *

"2. Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and

culverts within the district, to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work; provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe." (Emphasis ours.)

From the foregoing it seems that either type of special road district has been specifically empowered to construct bridges within such district. We have examined other statutes relating to such road districts as to the effect of the abandonment of public roads. At no place do we find that any transfer of ownership of the physical improvements, such as bridges and culverts used on a public road, is brought about by statute upon the abandonment of such public road. We therefore conclude that no such change of ownership is so effectuated by such abandonment and that the "title" of the special road district to the bridge mentioned in your letter of inquiry has not been impaired by reason of the abandonment of the public road therein located. This, we believe, is in accord with sound reasoning in that it permits the retention and use of the improvement by the district and within the area from whence came the tax money used for paying for such improvement, provided such is in fact the true circumstances.

CONCLUSION

In the premises we are of the opinion that the "title" to a bridge constructed out of district funds by a special road district upon a public road located within such district is not affected by the abandonment of such public road. It is our further opinion that the board of commissioners of such special

Mr. W. C. Whitlow

-4-

road district may thereafter dispose of such bridge or may dismantle and re-erect the same at some other place within such special road district where public convenience and necessity may require.

The foregoing conclusion is based upon the assumption that such bridge was paid for out of funds belonging to the special road district.

The above opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

WFB:vlw:vtl

ELECTIONS:
SALE OF INTOXI-
CATING LIQUOR:

It is illegal to dispense intoxicating liquor within the hours prescribed on the election day of any school director, fire prevention district director or sewer district trustee.



June 10, 1954

Honorable George White
Assistant Prosecuting Attorney
St. Louis County
Courthouse
Clayton, Missouri

Dear Sir:

We are in receipt of your recent request for an official opinion based upon a letter written to your office at the direction of Arthur C. Mosley, Sheriff of St. Louis County. The Mosley letter reads as follows:

"We have been informed by Asst. Prosecuting Attorney, Leonard Bornschein that on election days all 5% Taverns, Liquor Stores, must remain closed and 3.2% Taverns may remain open as usual. We have been enforcing the law as such.

"We have received complaints from different tavern operators that they were informed by the local office of Liquor Control, State of Missouri, that in such elections as for school trustees, fire trustees, and sewer board members, it is not necessary for them to close. Tavern owners were informed by the Liquor Control, inasmuch as there is not a bond issue and any money involved in the election that they may continue to stay open.

"The local office of Liquor Control was contacted and they informed us that they believe that the Attorney General gave them a verbal opinion, some time ago, and that is what they base their advice to tavern owners on."

Honorable George White

We note that reference is made above to "school trustees;" "fire district trustees"; and "sewer district trustees." Section 165.207 and 165.380 RSMo. 1949, uses the term "school Directors"; Section 321.120 RSMo 1949, uses the term "fire district directors;" and Section 249.140 RSMo 1949 uses the term "sewer district trustees."

These are perhaps minor differences, but in this opinion we shall hereafter use the statutory terms.

Your specific questions are whether places selling intoxicating liquor must remain closed during the election of school directors, fire district directors, and sewer district trustees? The prohibition which you mention is found in Section 311.290 RSMo 1949, and reads as follows:

"No person having a license under the provisions of this law shall sell, give away or otherwise dispose of or suffer the same to be done upon or about his premises, any intoxicating liquor in any quantity between the hours of 1:30 A.M. and 6:00 A.M. on week days and between the hours of twelve o'clock midnight Saturday and twelve o'clock midnight Sunday, or upon the day of any general, special or primary election in this state, or upon any county township, city, town or municipal election day, and if said person has a license to sell intoxicating liquor by the drink his premises shall be and remain a closed place as defined in this section upon the day of any general, special or primary election in this state or upon any county, township, city, town or municipal election day and between the hours of 1:30 A.M. and 6:00 A.M. on week days and twelve o'clock midnight Saturday and twelve o'clock midnight Sunday; provided, that the sale of intoxicating liquor may be resumed and the premises reopened on any such election day after the expiration of thirty minutes next following the hour or time fixed by law for the closing of the polls at any such election; and provided further, that where such licenses

Honorable George White

authorizing the sale of intoxicating liquor by the drink are held by clubs or hotels this section shall apply only to the room or rooms in which intoxicating liquor is dispensed; and, provided further, that where such licenses are held by restaurants whose business is conducted in one room only and substantial quantities of food and merchandise, other than intoxicating liquors are dispensed, then the licensee shall keep securely locked during the hours and on the days herein specified all refrigerators, cabinets, cases, boxes and taps from which intoxicating liquor is dispensed. A 'closed place' is defined to mean a place where all doors are locked and where no patrons are in the place or about the premises. Any person violating any provision of this section shall be deemed guilty of a misdemeanor."

From the above it is clear that if an election is a general, special or primary election in this state, or is a county, township, city, town or municipal election, that it is illegal to dispense intoxicating liquor on such election day, during the hours prescribed; but that if the election does not fall within any of the above categories, then intoxicating liquor may be dispensed on such election day.

In this regard we note further that the election of school directors shall be held at two o'clock p.m. on the first Tuesday in April of each year, as set by statute.

The first board of directors of the fire protection district, may, by Section 321.120 RSMo 1949, "be held separately, or may be consolidated and held concurrently with any other election, general or special, provided for in this chapter or otherwise." Such an election would, therefore, either be general or special. All further elections for fire protection directors shall (Section 321.210 RSMo 1949) be held on the first Monday in April of each year. The provisions for the election of the first board of sewer district trustees is substantially the same as that of the election of the first board of directors of a fire prevention district. Subsequent

Honorable George White

elections are fixed by statute (Section 249.150 RSMo 1949) to be held on the first Monday in April every two years.

With the above in mind, we now direct attention to the 1928 Missouri Supreme Court case of *Dysart vs. City of St. Louis*, 11 S.W. (2d) 1045. In that case the court was concerned, in part, with the definition of general, special and primary elections. In the course of its opinion the court stated at l.c. 1052:

"* * * But the definition of 'general election' is settled by an amendment to the Constitution adopted in 1920 (see Laws 1921, p. 703), by which section 12 of article 10 was repealed, and another section by the same number adopted. It provides:

"'No county, city, town, township, school district or other political * * * subdivision of the State shall * * * become indebted,' except by a two-thirds vote at an election held for that purpose; and, 'such proposition may be submitted at any election, general or special.'

"It follows that any local election, city, county, etc., may be either general or special, and this wipes out the definition of 'general election' in section 7058, or limits the implied distinction to state elections.

"It necessarily means that a special election is one called for a special purpose, not one fixed by law to occur at regular intervals. A primary election and a regular election are connected together in section 35 in regard to general registration, with the same requirement for a revision before a primary election as there is before a final election to elect officers. Therefore it avails nothing to distinguish a primary election from the statutory definition of any other general elections.* * *"

In view of the above it would appear that the elections for school directors, fire protection district directors, and sewer district trustees, which are held after the first such elections, are "general elections" within the meaning of Section 311.290, supra, and that the first elections held for the purpose of selecting these officials, if held on a day specially chosen for this

Honorable George White

purpose, and not on the day of any general election, is a "special election", within the meaning of Section 311.290, supra, and that whether the elections be general or special they come within the prohibition of Section 311.290, supra, and that it is illegal for any person to dispense intoxicating liquor on such days, within the hours prescribed.

CONCLUSION

It is the opinion of this department that it is illegal to dispense intoxicating liquor within the hours prescribed on the election day of any school director, fire prevention district director, or sewer district trustee.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW:ld

OFFICERS: Duties of prosecuting attorney and those of trustee of a county health center of the same county are repugnant or inconsistent to each other. Said offices are incompatible and one person may not hold both at the same time. Duties of county superintendent of schools and those of trustee of a county health center of same county are not repugnant or inconsistent to each other. Said offices are compatible and one person may hold both at same time.

June 28, 1954



Honorable J. Patrick Wheeler
Prosecuting Attorney
Lewis County
Monticello, Missouri

Dear Sir:

This department is in receipt of your recent request for a legal opinion, which reads in part as follows:

"May any County Officer elected at a general or special election, or appointed officer of the county serve in the capacity as a member of the Board of Trustees of the County Health Council, such council having been formed under the provisions of Chapter 205 R. S. Mo. 1953?"

The inquiry appeared to be very general and broad enough to inquire whether any county officer could, during the term for which he was elected or appointed, also serve as a trustee of a county health center of his county. We asked you to make your inquiry more specific by having it refer only to the county officer in which you are interested.

Your reply was to the effect that you are interested in the offices of prosecuting attorney and county superintendent of schools. Said reply read in part as follows:

"I can understand that the question is too general for an opinion. I would like to have the question answered concerning the Prosecuting Attorney and the County School Supt."

Honorable J. Patrick Wheeler

We construe your inquiries to be: (1) Are the offices of prosecuting attorney and trustees of the county health center compatible, so that one person may hold both at the same time in the same county? (2) Are the offices of county superintendent of schools and trustee of the county health center compatible, so that one person may hold both at the same time in the same county?

Before attempting to answer the inquiries, we must first correctly answer the following preliminary question: Is a trustee of a county health center a public officer, and if so, is he a county officer?

In the case of *State ex rel. Pickett v. Truman*, 333 Mo. 1018, a definition and some of the attributes of a public officer were given. At l.c. 1022, the court said:

"(2) In *Mechem on Public Officers*, page 1 and 2, section 1, it is said: 'A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.' We have approved this definition in *State ex rel. v. Bue*, 135 Mo. 325, 331, 332, 36 S. W. 636; *State ex rel. v. Hackmann*, 254 S. W. 53, 55, 300 Mo. 59; and *Hasting v. Jasper County*, 282 S. W. 700, 701, 314 Mo. 144, and it appears to be in harmony with the great weight of authority. (*State ex rel. v. Bond (W. Va.)*, 118 S. E. 276, 278, 279; *State ex rel. v. Board of Commissioners (Ohio)*, 115 N. E. 919, 920; *Bunn et al. v. People ex rel.*, 45 Ill. 397, 409.) The Ohio decision states that it is no longer an open question in that state that to constitute a public office 'it is essential that certain independent public duties a part of the sovereignty of the State, should be appointed to it by law.' Illustrative of what is meant by 'sovereignty of the State,' in the same opinion it is said: 'If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the State, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part

Honorable J. Patriok Wheeler

of the county or State, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the State."

In the case of State ex rel. v. Imel, 242 Mo. 293, and at l.c. 300, the court defined the terms "county officers" as follows:

"The words 'county officers' have two well defined meanings. In their most general sense, they apply to officers whose territorial jurisdiction is coextensive with the county for which they are elected or appointed. In a more precise and restricted sense, those words mean officers 'by whom the county performs its usual political functions, its function of government.' (Sheboygan County v. Parker, 70 U. S. 93, l.c. 96.)"

Section 205.050 RSMo 1949 states the purpose for which a county health center is established and reads as follows:

"The public health center is established, maintained and operated for the improvement of health of all inhabitants of said county or counties."

Section 205.031 RSMo Cum. Supp. 1953 gives the qualifications, appointment, and terms of trustees of a county health center. It is noted that under the provisions of this section the county court makes the original appointment of trustees of the newly established health center. After the original appointments, successor trustees are elected by the voters of the county in the manner provided by Section 205.041 RSMo Cum. Supp. 1953, except when vacancies occur, which the county court shall fill in the manner provided by said section. Section 205.031 reads as follows:

"1. The county court shall appoint five trustees chosen from the citizens at large with reference to their fitness for such office, all residents of the county, not more than three of the trustees to be residents of the city, town or village in which

Honorable J. Patrick Wheeler

the county health center is to be located, who shall constitute a board of trustees for said county health center.

"2. The trustees shall hold their offices until the next following general election, when five health center trustees shall be elected who shall hold their offices, three for two years and two for four years. The county court shall by order of record specify the terms of said trustees.

"3. At each subsequent general election the offices of the trustees whose terms of office are about to expire shall be filled by the election of health center trustees who each shall serve for a term of four years.

"4. Any vacancy in the board of trustees occasioned by removal, resignation or otherwise shall be reported to the county court and be filled in like manner as original appointments, the appointee to hold office until the next following general election, when such vacancy shall be filled by election of a trustee to serve during the remainder of the term of his predecessor.

"5. No trustee shall have a personal pecuniary interest, either directly or indirectly, in the purchase of any supplies for the health center, unless the same are purchased by competitive bidding."

Section 205.041 reads in part as follows:

"1. Each candidate for the office of health center trustee shall file with the county clerk an announcement of candidacy in writing not later than thirty days before the general election. The announcement shall indicate whether the individual is a candidate for a full or an unexpired term of a named predecessor. No filing fee shall be required to be paid upon the filing of any announcement. If announcements of a sufficient number of trustees are not filed, the county court shall appoint such trustee or trustees as may be necessary

Honorable J. Patrick Wheeler

to fill all vacancies on the board which result from the expiration of the term of any trustees and any such appointee shall serve until the next general election when a trustee shall be elected to fill the remainder of the unexpired term.

"2. The county court shall prepare a separate ballot containing the names of all candidates who have announced for trustee which shall not contain any designation of the political party affiliation of any candidate for trustee. The ballots shall designate the number of trustees to be elected and shall state whether any of the trustees is to be elected for an unexpired term, and shall be in form substantially as follows: * * *"

The Legislature enacted applicable statutes creating the position or office (if it is an office) known as trustee of the county health center and also provided that the health center program for the people of the county is to be carried on, or to have headquarters at a fixed location in the county known as the health center. The affairs of the health center are to be administered by trustees, and from the statutes quoted above, it is readily seen that the duties of such trustees are of a public, rather than of a private nature, and are county-wide in scope. The trustees are agents of the county and have been invested with the duty of exercising a portion of the police power of the state in regard to public health. It has long been the rule in Missouri that the State may, in the exercise of its police power, make regulations affecting public health for the protection and benefit of its citizens. This principle was held to be the law in the case of Bader Realty & Inv. Co. v. St. Louis Housing Authority, 358 Mo. 747. At l.c. 754 the court said:

" * * * As we read the 'Housing Authorities Law' (Mo. R.S.A. Sec. 7853 to 7875, inclusive), its underlying purpose is slum clearance, public safety, public health, and the prevention of crime and juvenile delinquency. Those matters present a proper field for the exercise of the state's police power. * * *"

Honorable J. Patrick Wheeler

None of the sections of Chapter 205 RSMo 1949 entitled "County Health and Welfare Programs" or those of Chapter 205 RSMo Cum. Supp. 1953, bearing the same title, specifically provide that health center trustees are public officers. However, it is believed that from the references made in these sections to such trustees that it was the intention of the Legislators that the trustees should be public officers. Paragraph 1, Section 205.042 supra, requires the newly elected or appointed trustee to qualify within ten days by taking the oath required of all civil officers. Said oath is prescribed by Article VII, Section 11, Constitution of Missouri 1945, and reads as follows:

"Before taking office, all civil and military officers in this state shall take and subscribe an oath or affirmation to support the Constitution of the United States and of this state, and to demean themselves faithfully in office."

When paragraph 1, Section 205.042 supra, is read and construed with other sections of the same Chapter, we feel that they clearly show the legislative intent to be that the trustees should be public officers, chosen by the people, the same as other county officers. Consequently, we must conclude that county health center trustees are public officers within the meaning of the definitions of public officers given above. Since they have only been given authority to perform their duties within the territorial limits of their respective counties, they are "county officers" within the meaning of the definition of these terms given in the case of *State ex rel. v. Imel* supra.

Our answer to the preliminary question is that a trustee of a county health center is a public officer.

In order to determine whether the offices of prosecuting attorney and county health center trustee are compatible or incompatible, the statutory duties of the former office must be considered and compared with those of the latter office. However, before doing so, we call attention to the fact that there are no statutory prohibitions in Missouri against one person holding both of these offices at the same time. Unless the duties of one are inconsistent with those of the other, it appears that one person may legally hold both offices at the same time, since there was no such prohibition under the common law.

The common law doctrine of compatibility and incompatibility of different offices was discussed and compared in the leading case of *State ex rel. v. Bus*, 135 Mo. 325. The court had under

Honorable J. Patrick Wheeler

consideration the offices of deputy sheriff of the City of St. Louis and school director, and ruled these two offices to be incompatible and that they could not be held by the same person at the same time. We quote from l.c. 338:

"V. The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in People ex rel. v. Green, 58 N.Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.' * * *

We have previously quoted those statutes setting out the duties of the trustees of a county health center and now we call attention

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to those referring to the duties of the prosecuting attorney. We shall not attempt to give every section of the statutes relating to every duty of the prosecutor, but shall call attention only to those which give the general duties of said officer. Sections 56.060 and 56.070 RSMo 1949 prescribe the general duties of prosecuting attorneys in each county of the state. Section 56.060 reads as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over three hundred thousand inhabitants, by the city, all necessary abstracts of records and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

Section 56.070 reads as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in

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which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before the magistrate courts, when the state is made a party thereto; provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

Section 56.070 supra, requires the prosecuting attorney to represent the county in all civil suits or other matters of law, in which the county is interested; to investigate all claims against the county, draw all contracts relating to the business of the county, and give his written opinion without fee upon any matters of law in which the county is interested to the county court when requested so to do by said court, or one of the judges of same.

The health center is an institution of the county, the expenses of which are paid from a special fund raised by a county health center tax, and certainly the county is financially interested in the health center and all its activities. Therefore, in view of the provisions of Section 56.070 supra, and particularly those referred to in the preceding paragraph, it is the duty of the prosecuting attorney to represent his county in all matters in which the health center is involved.

An example of some of the statutory duties of the prosecuting attorney and which he might be called upon to perform in regard to the health center are referred to in paragraph 9, Section 205.042 RSMo Cum. Supp. 1953.

Said section authorizes the trustees of a county health center to enter into contracts and agreements with federal, state, county,

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school and municipal governments, with private firms or individuals for the furtherance of the health activities, except as limited by another section of the same chapter.

Undoubtedly, such contracts would be a matter of county interest, and in all such matters it would be the prosecuting attorney's duties to draw, or at least to supervise the drawing of same, and to pass upon the legality of all such contracts, regardless of whether they were written by him, and before submission to the board of trustees for signing.

Section 205.060 RSMo Cum. Supp. 1953 places a limitation upon the use of the health center's facilities and it is the prosecutor's duty to see that the law is strictly enforced, so that such facilities shall not be used contrary to the provisions of the statute and only those persons are admitted to the institution for medical treatment who are entitled to be admitted under the provisions of said section. Section 205.070 RSMo Cum. Supp. 1953 provides that the health center may accept gifts of real or personal property from any of the donors mentioned. The title to all said gifts shall vest in the county for the benefit of the health center. The donation of such gifts to the county would be transactions in which the county is very much interested, and in such instances, it is the prosecuting attorney's duty to see that such transactions are properly handled so that the title to said gifts will vest in his county.

Section 205.090 RSMo Cum. Supplement 1953 requires the county health center trustees to file a yearly report of their proceedings with the county court and also a sworn statement of their receipts and expenditures during the preceding calendar year. In the event the trustees misappropriated any of the health center funds, it would be the duty of the prosecuting attorney to institute criminal proceedings against the guilty parties, as well as civil proceedings against them for the recovery of the health center funds.

From the instances given above involving the duties of the prosecuting attorney and his relationship to the county health center, it is obvious that the duties of the prosecuting attorney are repugnant, or inconsistent to those of the office of trustee of the county health center. Therefore, said offices are incompatible and one person cannot legally hold both at the same time in the same county, and our answer to the first inquiry of the opinion request is in the negative.

The second inquiry of the opinion request is whether or not the office of county superintendent of schools and trustees of

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the county health center are compatible so that one person may hold both at the same time in the same county.

It will be noted that this inquiry is the same as the first one except that the office referred to is different.

We have previously stated that in our opinion a trustee of a county health center is a public (county) officer, and since the office of county superintendent of schools has been made a county office by statute, the remainder of our discussion will be in regard to the compatibility or incompatibility of the two offices in question.

The general duties of a trustee of a county health center have been noted from the statutes quoted above and it now remains for us to notice the duties of the county superintendent of schools and to compare them with those of the former office in order to reach a conclusion as to the compatibility or incompatibility of the two. Section 167.040 RSMo 1949 gives the general duties of the county superintendent of schools and reads as follows:

"The county superintendent shall have general supervision over all the schools of his county, except in city, town and village school districts employing a superintendent who devotes at least one-half of his time to the direct work of supervision. He shall visit each school under his jurisdiction at least once each year, and as many other times as practicable; he shall examine the classification of pupils, the methods of instruction, the manner of discipline, the order maintained, the results secured, and make such suggestions to teachers and school boards as he may deem advisable; he shall inspect the ventilation, note the condition of the building, furniture, apparatus, grounds and appurtenances thereto belonging, and report the same to the board in writing, with such suggestions as he may consider necessary to the health, comfort and progress of the pupils; he shall examine the teacher's register and the district clerk's record and see that they are kept according to law; he shall furnish, annually, statements to the district clerks showing the assessed valuation of their respective districts; he shall receive, and, if properly made, approve estimates and enumeration lists and turn same over to the county clerk; he shall assist the district clerks, when necessary, in making

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their reports, and see that all warrants have been duly issued 'by order of the board,' either for services actually rendered or for material actually furnished."

Upon a comparison of the general duties of a health center trustee with those of county superintendent of schools given in the last quoted section, it is apparent that each office and its respective duties is in no way related to the other, and that each officer performs separate and distinct functions in an entirely different field of endeavor, and that either office is not subordinate to or in any way dependent upon the other.

What has previously been stated with reference to the common law rule, in effect in Missouri, which does not prohibit one person from holding more than one office at the same time, applies fully to the two offices of county superintendent of schools and county health center trustee. Since the offices or the duties of each are not inconsistent, and in the absence of any statutory provision against one person holding both, it is our thought that said offices are compatible, and that one person may hold both in the same county at the same time. Therefore, our answer to the second inquiry is in the affirmative.

CONCLUSION

It is the opinion of this department that the duties of the office of prosecuting attorney are repugnant or inconsistent to those of trustee of a county health center of the same county. Said offices are incompatible and one person may not hold both at the same time.

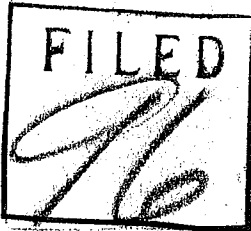
It is further the opinion of this department that the duties of the office of county superintendent of schools are not repugnant or inconsistent to those of trustee of a county health center of the same county. Said offices are compatible and may be held by one person at the same time.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul W. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General

COUNTY COURT: County court of a third class county may not ap-
TREASURER: point a deputy county treasurer; a county de-
COUNTY DEPOSITORY: pository may honor checks signed by a de facto
DE FACTO OFFICERS: deputy to the county treasurer if it has no
DEPUTIES: knowledge of the invalidity of the appointment
OFFICERS: of the deputy.



October 4, 1954

Honorable J. Patrick Wheeler
Prosecuting Attorney
Lewis County
Monticello, Missouri

Dear Mr. Wheeler:

In your letter of July 14, 1954, you requested
an official opinion on the following questions:

"May the County Court of a third class
county appoint a Deputy County Treasurer?

"If your answer to the previous question
is in the negative, then, what is the
responsibility of a county depository
who makes payments on checks issued by
a Deputy county treasurer?"

In a subsequent letter you stated:

"I wish to advise that the checks signed
by the propertive Deputy County Treasurer
were signed as follows: 'Lee E. McKim,
Treasurer, by Erma Dee Martin, Deputy',
With respect to your question No. 2, you
are correct in presenting that my inquiry
relates only to checks honored by the de-
pository in the past and not to future
checks. This office gave an opinion to
the Court after learning of the action
taken that they had no authority to ap-
point a Deputy County Treasurer and there-
after the depository ceased to honor any
checks. My question is merely in regard
to the checks honored by the depository
prior to the time which they were advised

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that the deputy was improperly appointed. Further, I might say, that I have no indication that these checks were issued for anything other than value received by the County, and my interest in determining the checks passed by the depository is to ascertain whether or not they can be passed by an audit. If not then of course some arrangement would have to be made with the depository to have this error corrected."

We note that Lewis County does not have township organization.

An examination of the statutes pertaining to counties of the third class discloses no authority in the county court of third class counties to appoint a deputy county treasurer. County courts possess only limited jurisdiction and outside of the management of county fiscal affairs possess no powers except those conferred by statute. *Missouri Electric Power Company, et al. vs. City of Mountain Grove, et al.*, 352 Mo. 262, 176 S.W. (2d) 612, 615. In *State vs. Jackson*, 229 Mo. App. 842, 84 S.W. (2d) 988, it was said, l.c. 989:

"* * * Such court is a creature of the Constitution, and its powers are limited by the terms of the various statutes defining its powers. It has no common-law or equitable jurisdiction."

Since there is no statutory authorization for county courts of third class counties to appoint a deputy county treasurer, we must conclude that such courts have no such authority. However, the county treasurer may appoint a deputy to discharge the clerical duties of the office. This power is derived from the common law, which is stated in *Small vs. Field*, 102 Mo. 104, l.c. 119, as follows:

"* * * But at common law a ministerial officer had authority to appoint a deputy. Com. Dig.--Tit. Officer (D.I); Am. & Eng. Cyclop. of Law--Tit. Deputy, 624. Thus a sheriff, though his patent of office does not say he may execute his office per se vel sufficientem deputatum suum, yet he may make a deputy. 7 Bac. Ab.--Tit. Offices & Officers, 316 (L).

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"The office of clerk of a court seems to be one which, from its nature and constitution, implies a power or right to execute it by deputy. Whenever nothing is required but superintendency in office a ministerial officer may make a deputy. 7 Bac. Abr. 316, 317, --Tit. Offices and Officers. And the rule is general that a deputy may do every act which his principal might do. Com. Dig. Officers, D. 3; Confiscation Cases, 20 Wall. 92."

Therefore, if the treasurer made the appointment of the deputy the checks signed by the deputy in the manner set out above would be valid. If the appointment was not made by the treasurer, nevertheless, the person was a deputy de facto, and thus her acts were valid as to third persons without knowledge of the invalidity of her appointment. A de facto officer is one who has the reputation of being the officer he assumes to be, but is not a good officer in point of law. 67 C.J.S., paragraph 135, page 438.

The Supreme Court of Missouri in *State ex rel. vs. Perkins*, 139 Mo. 106, 1 c. 116, 117, 40 S.W. 65, discussed this doctrine as follows:

"The foundation stone of this whole doctrine of a de facto officer, as gathered from all the authorities, seems to be that of preventing the public or third persons from being deceived to their hurt by relying in good faith upon the genuineness and validity of acts done by a pseudo-officer. However much color of authority may clothe the person who assumes to perform the functions of an office and discharge its duties, yet, if the public or third persons are not deceived thereby, if they know the true state of the case, the reason which gives origin or existence to the rule, which validates the act of an officer de facto, ceases; and with it cease also all of its ordinary validating incidents and consequences."

Therefore, if the depository believed in good faith that the person signing the checks was, in fact, a deputy

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of the county treasurer as she was held out to be, it was justified in honoring said checks.

CONCLUSION

In the premises, it is the opinion of this office that the county court of a third class county may not appoint a deputy county treasurer; and that a county depository may honor checks signed by a de facto deputy to the county treasurer, if it has no knowledge of the invalidity of the appointment of the deputy.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk

COUNTY TRUSTEE:
DRAINAGE DISTRICT:
TAXATION:

A drainage district is not entitled to participate in the surplus of proceeds received from lands sold by a county trustee under the provisions of Section 140.260, RSMo 1949. A drainage district does not have the authority to compromise delinquent drainage taxes.



December 14, 1953

Honorable James J. Wheeler
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Mr. Wheeler:

In your letter of September 14th, 1953, you requested an opinion of this office as follows:

"On August 25, 1952, the trustee for this county purchased 40 acres of land at the third tax sale for \$85.69, and received a tax deed for same.

"This land was subject to drainage district tax in the amount of approximately \$490.00 at the time.

"On August 3, 1953, the county trustee sold the land for the sum of \$250.00.

"The County Court wishes to know if the excess amount received above state and county taxes should go to the tax sale surplus fund or be applied on the delinquent drainage tax.

"Also, the County Court wishes to know if a drainage district has the power to rebate delinquent drainage taxes."

Provision is made for the purchase by the county of land sold at the third offering, by Section 140.260, RSMo 1949.

"1. It shall be lawful for the county court of any county, and the comptroller, mayor and president of the board of assessors of the

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city of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which section 140.250 is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids.

* * *

"5. All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon order of the county court of the respective counties and the comptroller, mayor and president of the board of assessors of the city of St. Louis, and the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of. * * *" (Emphasis curs.)

Thus, the answer to your first question depends upon the interpretation given to the words "funds entitled to receive the taxes on the lands or lots so disposed of."

That the Jones-Munger Act, of which Section 140.260 is a part, was not intended to apply to collection of drainage and levee district taxes is indicated in St. John Levee and Drainage District of Missouri vs. Pillman, 336 Mo. 93, 76 S.W. (2d) 1095, l.c. 1096, wherein the court stated:

"* * * We find nothing in the act which indicates that the Legislature intended to change the procedure for the enforcement of levee and drainage taxes. * * *"

Thus, Section 140.260 does not apply to drainage districts. To buttress our conclusion that drainage districts are not entitled to participate in the proceeds at hand, it is noted that Section 242.590 and Section 243.370 provide for liens for drainage districts, and give to drainage districts the power to preserve their right to taxes on the land if they take advantage of the statutory methods provided. In view of the distinct and separate categories into which collection of drainage district taxes, and the collection of general taxes are placed, it is our conclusion that the drainage

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district tax collection provisions are exclusive, and that if a drainage district fails to take advantage of its rights under those provisions, it cannot fall back upon the Jones-Munger Act to remedy its own neglect.

The next question is whether a drainage district has the power to "rebate" delinquent drainage district taxes. It is our assumption that you do not mean "rebate" but rather inquire whether the county court has the power to compromise drainage district taxes. Section 140.120, RSMo 1949, authorizes the compromise of back taxes as follows:

"Whenever it shall appear to any county court, or if in such cities the register, city clerk or other proper officer, that any tract of land or town lot contained in said back tax book or recorded list of delinquent land and lots in the collector's office is not worth the amount of taxes, interest and cost due thereon, as charged in said back tax book or recorded list of delinquent land and lots in the collector's office, or that the same would not sell for the amount of such taxes, interest and cost, it shall be lawful for the said court, or if in such cities the register, city clerk or other proper officer, to compromise said taxes with the owner of said tract or lot, and upon payment to the collector of the amount agreed upon, a certificate of redemption shall be issued under the seal of the court or other proper officer, which shall have the effect to release said lands from the lien of the state and all taxes due thereon, as charged on said back tax book or recorded list of delinquent land and lots in the collector's office; and in case said court or other proper officer shall compromise and accept a less amount than shall appear to be due on any tract of land or town lot, as charged on said back tax book or recorded list of delinquent land and lots in the collector's office, it shall be the duty of said court or other proper officer to order the amount so paid to be distributed to the various funds to which said taxes are due, in proportion as the amount received bears to the whole amount charged against such tract or lot."

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The above section does not authorize compromise by drainage districts, of delinquent drainage taxes, nor does any other statute so authorize. The powers of drainage districts is defined in Thompson v. City of Malden, 118 S.W. (2d) 1059, 1.c. 1063, as follows:

"* * * Their rights, powers and liabilities are specifically limited by the statutes that create them. * * *"

Thus in the absence of such statutory authority, it is our conclusion that such compromise is not permitted.

CONCLUSION

It is therefore, the opinion of this office that a drainage district is not entitled to participate in the distribution of the surplus of proceeds received from lands sold by a county trustee under the provisions of Section 140.260, RSMo 1949, and that a drainage district does not have the authority to compromise delinquent drainage taxes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:vlw